IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-827

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Petitioners,

v.

TRANS WORLD AIRLINES, INC., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

A.

214 Federal Supplement 106

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

Feb. 7, 1963.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ET AL., *Additional Defendants on Counterclaims.*

METZNER, District Judge.

Defendant Hughes Tool Company (Toolco) moves to dismiss the complaint pursuant to rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state any claim upon which relief can be granted. The original notice of motion was filed on August 9th, 1961 and in addition to the grounds now urged requested summary judgment pursuant to rule 56 of the Federal Rules of Civil Procedure. In effect, the present notice of motion brings on for hearing the original motion.

In its brief Toolco has stated,

"At the suggestion of the Court (Transcript of pre-trial conference of September 6, 1961, pp. 50, 52)

Toolco agreed to postpone the motions and thereafter commenced its pre-trial examination of TWA."

The opinion of this court of January 19th, 1963 sets forth the numerous occasions on which counsel for Toolco agreed that the motion as originally filed was not ripe for determination. Consequently, it was not a suggestion of the court, to which Toolco courteously agreed, that the matter be postponed. Rather it was an understanding by counsel that under the decisions of this circuit summary judgment in this type of case should not be considered until the deposition proceedings are completed. (See also Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)). The grounds now urged under rule 12(b) existed and were adverted to in the original notice of motion. Since counsel for Toolco has indicated he was prepared at that time to argue the matter, he could just as well have submitted it then, instead of requesting on January 14th, 1963 that the motion now be heard, when the taking of the deposition of Howard R. Hughes is imminent. Furthermore, the Special Master on October 25th, 1962 granted the second adjournment of this deposition, from October 29th to February 11th, 1963, and stated that the long adjournment of more than three months was in order to allow Toolco's counsel sufficient time to make whatever motions he thought were necessary.

On January 14th, 1963, when Toolco moved that its motion to dismiss be set down for hearing, it also requested that TWA first proceed by written interrogatories directed to Hughes, instead of by oral deposition. This request was formally denied on January 19th, 1963, after a pretrial conference held on January 17th.

Counsel for Toolco continually relates the taking of the deposition to a determination of the motion to dismiss. As I have indicated before, this deposition depends not

only on the existence of alleged valid claims against Toolco, but on Toolco's counterclaims for $385,000,000 against plaintiff and the additional defendants.[1]

So much for the underbrush. Now as to the merits of the motion, there is no doubt that the complaint on its face sets forth a claim against the defendant and is not subject to dismissal under rule 12(b) (6).

Briefly, the plaintiff, TWA, charges that Toolco, Hughes, and Holliday, named defendants, and Atlas Corporation have combined and conspired to restrain, and have attempted to monopolize, interstate and foreign commerce of the United States in the furnishing of jet aircraft and/or nonjet aircraft by sale, lease or other means, to TWA, and to TWA and other air carriers, in violation of sections 1 and 2 of the Sherman Act and sections 3 and 7 of the Clayton Act. It more specifically alleges that the defendants and Atlas combined to restrain commerce

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[1] On the morning of the argument of this motion (February 6th, 1963) Toolco filed another notice of motion returnable February 8th, 1963 requesting that all further proceedings with respect to the counterclaims be stayed pending a disposition by the Civil Aeronautics Board of a "Complaint of Hughes Tool Company and Request for Investigation" which had been filed that day with the CAB. The only document attached to the notice of motion is a copy of the complaint filed with the CAB, seeking relief under sections 408, 409, 411 and 1002 of the Federal Aviation Act. That complaint names all of the additional defendants in the action pending in this court and also Pan American World Airways, Inc. and Juan T. Trippe. It sets forth some of the allegations contained in the counterclaims and also makes reference to the proposed merger of TWA and Pan Am. It further alleges that Trippe, the dominant force in Pan Am, also has been in the position to influence the policies of Metropolitan Life Insurance Company, a large lender to TWA and one of the additional defendants in this action. Thus, the conspiracy alleged in the counterclaims has been enlarged by including Pan Am and Trippe. Jurisdiction of the CAB is predicated upon a claim that the decision in Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), grants the CAB primary jurisdiction.

by providing financing of the acquisition by TWA of aircraft only upon the condition that TWA acquire all such aircraft from Toolco, and that they required TWA to boycott all suppliers of aircraft except Toolco, in violation of section 1 of the Sherman Act; and that sales and leases of jet-powered aircraft were made on the condition that the purchaser or lessee would not buy or lease the goods of a competitor of the vendor or lessor, in violation of section 3 of the Clayton Act. The complaint also charges that acquisitions of the stock of a corporation were made in violation of section 7 of the Clayton Act.

The first claim is concerned with acts allegedly committed during and prior to December 1960 which, it is claimed, violate all of the above mentioned statutes. The second claim deals with events occurring subsequent to December 1960 which are alleged to violate sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. For these claims, plaintiff seeks treble damages, divestiture, and an injunction. The third claim charges that the defendants have wilfully and maliciously damaged the business of TWA by the acts alleged in the prior claims, and seeks damages and an injunction under the common law.

Defendant Toolco urges that the complaint be dismissed because the control by Toolco over the plaintiff was authorized by the CAB and was thereby exempted from the antitrust laws. The other ground urged is that the subject matter of the complaint is within the exclusive primary jurisdiction of the CAB.

Toolco indicates that it has withdrawn its motion for summary judgment. However, its brief relies on matter outside the complaint to justify dismissal on the ground that the acts done by Toolco were pursuant to the exercise of control over TWA authorized by the CAB and therefore exempt from the antitrust laws. Dismissal under rule 12(b) (6) is not warranted, though summary judg-

ment might be available. Putnam v. Air Transport Ass'n of America, 112 F.Supp. 885 (S.D.N.Y. 1953). The defendant appears to be in a procedural dilemma. Since defendant has raised the issue of exemption in its third affirmative defense, the court will consider this branch of the motion as one for judgment on the pleadings pursuant to rule 12(c). Matters dehors the complaint may be considered on the branch of the motion seeking dismissal for lack of subject matter jurisdiction. Cohen v. American Window Glass Co., 126 F.2d 111, 114 (2d Cir., 1942); Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir., 1940); Moore v. Gorman, 75 F.Supp. 453 (S.D.N.Y. 1948).

Toolco relies on the 1944 and 1950 orders of the CAB permitting Toolco to acquire control of TWA. 6 CAB 153; 12 CAB 192. These orders were issued pursuant to section 408(5) of the Civil Aeronautics Act of 1938,[2] which makes it unlawful without CAB approval for "any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever". Toolco was considered as one engaged in a phase of aeronautics because of its activities in the development of aircraft and accessories.

Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, provides that

> "Any person affected by any order made under sections 408 [49 U.S.C. § 1378] * * * shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do any-

[2] This section is now 49 U.S.C. § 1378(5). The Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. § 1301 et seq., superseded the Civil Aeronautics Act of 1938, 52 Stat. 973, making no changes relevant to the problem before the court.

thing authorized, approved, or required by such order."

It is Toolco's contention that all the acts complained of by TWA are immunized from claims of violations of the antitrust laws because of section 414. This leads to an examination of what action was approved by the orders issued pursuant to section 408(5) and what is the scope of the exemption provided by the words "insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order", in section 414.

Statutory authority granted regulatory agencies to give exemption from the application of the antitrust laws is not unusual.[8] But the Supreme Court has clearly stated that immunity from the antitrust laws is not to be lightly implied. California v. Federal Power Comm'n, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). Regulated industries are not per se exempt from the antitrust laws. United States v. Borden Co., 308 U.S. 188, 198-199, 60 S.Ct. 182, 84 L.Ed. 181. And it is elementary that repeals by implication are not favored. Georgia v. Pennsylvania R. R., 324 U.S. 439, 456, 65 S.Ct. 716, 89 L.Ed. 1051 (1945). In the latest decision by the Supreme Court, Pan American World Airways, Inc. v. United States, supra note 1, which will be discussed in detail below, the Court stated that

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[8] See, e. g., 47 U.S.C. § 222(b)(1) (telegraph mergers approved by the Federal Communications Commission); 47 U.S.C. § 221(a) (telephone mergers approved by FCC); 46 U.S.C. § 814 (rate fixing and other agreements between water carriers approved by the Federal Maritime Board); 49 U.S.C. § 5 (railroad mergers approved by the Interstate Commerce Commission); 49 U.S.C. §§ 5a-b (agreements between carriers involving rates approved by ICC); 15 U.S.C. § 18 (exempting from the operation of section 7 of the Clayton Act transactions approved within their statutory authority by the CAB, FCC, Federal Power Commission, ICC, FMB, Secretary of Agriculture, and, in some cases, the Securities and Exchange Commission).

the regulatory scheme here in question would not be read as designed completely to displace the antitrust laws "absent an unequivocally declared congressional purpose so to do." 371 U.S. at 305, 83 S.Ct. at 482. It went on to say that the antitrust problems "expressly entrusted to [the CAB] encompass only a fraction of the total." Ibid.

The orders of 1944 and 1950 relied on by Toolco merely approved the acquisition of control of TWA by Toolco. The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided by section 414. Cf. United States v. Southern Pac. Co., 290 Fed. 443 (D.Utah 1923). These orders did not give Toolco a license to engage in other acts that normally may be forbidden by the antitrust laws. What has been approved and exempted is the fact of "acquisition of control", not activities engaged in by the controlling party subsequent to acquisition, which may be illegal.

I have found no case and none has been cited to me which interprets the words "necessary to enable such person to do anything authorized, approved, or required by such order", or similar exemptive language in other statutes, in a way that will sustain Toolco's position. In Putnam v. Air Transport Ass'n of America, supra, the plaintiff was attacking a claimed boycott by the defendants. The court in applying section 414 stated that the boycott was "the inevitable result" of the agreement sanctioned by the CAB which by its terms permitted the defendants to choose with whom they would deal. This is far different from the immunization claimed by Toolco. Congress could not have intended that restraints or at-

tempts to monopolize, subsequent to an order allowing acquisition of control, were necessary to enable Toolco to do anything authorized or approved by the order.

One more point merits discussion under this branch of the motion. The second claim for relief is based on acts alleged to have been committed by the defendants and Atlas subsequent to December 1960. In December 1960 TWA moved before the CAB for modification of the original order of 1944 as amended. Approval was also sought

> "under section 408 * * * for the transactions contemplated under the financing plan. Similarly sought is approval * * * under section 409 of the Act, of the interlocking relationships arising out of the designation of Raymond M. Holliday, as a representative of Toolco, and of Ernest R. Breech and Irving S. Olds as representatives of the banks and institutional investors, to serve as Voting Trustees under a Voting Trust set up for the Toolco-TWA stock."

This relief was requested in connection with the jet aircraft financing transactions which resulted in Toolco's putting its 78% stock interest in TWA under a voting trust, which in effect gave control of TWA to the lenders who are named as additional defendants in this action.

On December 29th, 1960 the CAB entered its order on this motion (Order No. E-16195). In the course of the opinion, the CAB said at page 6:

> "Under these circumstances, we think it clear that Board action to facilitate TWA's acquisition of jet equipment is in the public interest. At the same time, however, it is evident that Toolco's control of TWA, as exercised through Hughes, has presented substantial problems requiring the Board's attention.
>
> "In short, and without further description of these problems, the Board wishes to make clear the fact

that it would anticipate the proper filing of an application under section 408 of the Act and the obtaining of the approval of the Board before Toolco would attempt to reassume control over TWA.[19] It is clear that such approval would not be forthcoming without a searching inquiry into the public interest factors affecting this control.[20] ''

Footnote 19 in the above quotation reads as follows:

''The Option Agreement requires Toolco, in exercising the option, to provide a satisfactory opinion of counsel that the exercise of the option, by purchase of the notes, does not require governmental or regulatory approval or that such approval has been granted and is in force. No such provision could, of course, preclude dissolution of the voting trust after the ten-year term has expired. Nonetheless, it is clear that Toolco should not resume direct control at that time unless prior approval of the Board is sought and obtained.''

It is clear from this opinion that the CAB does not look upon Toolco as controlling TWA after December 1960. Thus, anything done by Toolco subsequent to that date has not been approved by orders of the CAB and certainly no exemption exists as to the second claim.

We come now to the question of ''primary jurisdiction'' which is defendant's second ground for dismissal of these claims. In discussing the primary jurisdiction of the CAB in relation to this complaint, there is some overlap with the discussion as to the effect of an order issued under section 408(5) and the extent of the exemption granted by section 414. In this case we are concerned primarily with whether there exists exclusive primary jurisdiction in the CAB without regard to whether or not it has taken any action in relation to a particular transaction. Cf. Far East Conference v. United States, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576 (1952).

Defendant places great reliance upon the recent decision of the Supreme Court in Pan American World Airways, Inc. v. United States, supra, popularly known as the Panagra case. In determining the scope of this decision we must first go to the next to the last sentence of the majority opinion, which reads:

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." 371 U.S. at 313, 83 S.Ct. at 486.

The Court was dealing with section 411 of the act, 49 U.S.C. § 1381, which gives the CAB jurisdiction over "unfair or deceptive practices" and "unfair methods of competition" by air carriers. The acts charged to be antitrust violations were limitations of routes, divisions of territories, and the relation of a common carrier to air carriers, which the Court stated were "precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers." 371 U.S. at 305, 83 S.Ct. at 482. The Court went on to say:

> "It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the 'public interest' as defined in § 2 were held to be antitrust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review * * *." 371 U.S. at 309, 83 S.Ct. at 484.

If we substitute in this quotation the words "acquisition of control of any air carrier by any person engaged in any other phase of aeronautics" in place of "an affiliation between a common carrier and an air carrier", we have presented the fact situation upon which Toolco relies. However, the acts complained of by TWA are acts allegedly done by the controlling party after the acquisition had been approved, not only to the detriment of the carrier in question, but to other carriers and to competitors of the controlling party. This in my view is the distinguishing factor between this case and the Panagra case. While the acts charged here could be proper subjects for consideration by the Board in determining whether control of TWA by Toolco was in the public interest,[4] they are not the type of acts over which the Board has exclusive primary jurisdiction. They are not within the contemplation of the regulatory powers granted the CAB. Cf. Georgia v. Pennsylvania R. R., supra.

Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in the Panagra case to the effect that since the Board's essential regulatory powers deal with the division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here. 371 U.S. at 313 n. 19, 83 S.Ct. at 486 n. 19.

It is also clear that once a regulatory agency has acted the court is competent to consider and determine the scope of the exemption claimed. River Plate & Brazil Conferences v. Pressed Steel Car Co., 227 F.2d 60 (2d Cir., 1955); Putnam v. Air Transport Ass'n of America, supra. The cases of American Airlines v. Standard Air Lines, 80

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[4] See CAB Order No. E-16195 quoted at page 13, supra.

F.Supp. 135 (S.D.N.Y. 1948) and United States v. Railway Express Agency, 89 F.Supp. 981 (D.Del. 1950), relied on by Toolco, are not in point.

In addition to the determination that as a matter of law the Board does not have exclusive primary jurisdiction over the acts alleged in the complaint, the practical aspects of this case make especially apposite the statement in the River Plate case, supra, to the effect that a reference to the agency would be "useless and time-consuming" (227 F.2d at 63). Over 10,000 pages of testimony have already been taken by Toolco in deposition proceedings and over one and a quarter million documents have been produced in these proceedings by all parties. If there is any policy that would favor referral, it is not present in this case. See Atlantic Coast Line R. R. v. Riss & Co., 105 U.S.App.D.C. 380, 267 F.2d 657, 658 (1958).

Consequently, the motion to dismiss is denied. The application made upon oral argument for a certificate pursuant to 28 U.S.C. § 1292(b) was denied at that time. Toolco's application for a stay of all deposition-discovery proceedings pending an application for a stay to the Court of Appeals was granted on the oral argument to the extent that all deposition-discovery proceedings are stayed until 5 p.m. February 8th, 1963 to allow Toolco time to request a stay from the Court of Appeals beyond that time.

So ordered.

B.

32 Federal Rules Decisions 604

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

May 3, 1963.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*,

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES ET AL., *Additional Defendants on Counterclaims.*

METZNER, District Judge.

The plaintiff Trans World Airlines, Inc. (TWA) has moved for an order pursuant to rules 37(b) (2) (iii), 37 (d) and 55(b) (2) of the Federal Rules of Civil Procedure directing the entry of a judgment by default against the defendant Hughes Tool Company (Toolco). It requests that a hearing be held to determine the amount of damages to be paid by Toolco for the injuries alleged in the complaint, and that Toolco divest itself of all of its right, title and interest in the stock of TWA. The motion also seeks leave to increase the *ad damnum* clause following paragraph 70 of the complaint, from $105,000,000 to $135,000,000. It further seeks a dismissal of the counterclaims with prejudice. The motion further requests that Toolco, its officers and employees, or anyone acting in concert with them, be enjoined from instituting any action based upon the counterclaims set forth in the answer of Toolco and from instituting any proceeding before an administrative agency of the United States in which TWA is a party and which is based upon the allegations of the counterclaims. Finally,

it is requested that the claims asserted by TWA against the defendant Holliday be severed from these proceedings.

Toolco owns 78% of the stock of TWA and Howard R. Hughes owns all of the stock of Toolco. It is clear that during all of the times covered by the complaint the management of TWA was controlled by Hughes personally.

Pursuant to an authorization from Hughes, the attorney for Toolco accepted service of a witness subpoena directed to Hughes by TWA. The deposition of Hughes was originally scheduled for September 24th, 1962 and was adjourned by the court to October 29th, 1962. On October 25th the Special Master adjourned the deposition of Hughes to February 11th, 1963. On December 28th, 1962 the Special Master stated that when this adjournment was granted there was no doubt that it was the intention and expectation that the deposition would start on the adjourned date and proceed until it was concluded according to law.

In the pretrial order of January 10th, 1963 the court affirmed this ruling of the Special Master, and stated that the date of February 11th, 1963 would be adhered to in the absence of extraordinary circumstances. The order of January 10th also directed Toolco to produce certain documents as to which it claimed an attorney-client privilege. The order pointed out that Toolco's opposition to producing such documents was in fact a reargument of the order of this court dated July 24th, 1962 which denied the claim of privilege.

The order of January 10th also denied Toolco's application to proceed at that time with the examination of two witnesses on the ground that such deposition would interfere with the taking of the Hughes deposition scheduled for February 11th.

On January 15th counsel for Toolco moved for an order that the Hughes deposition be taken on written interroga-

tories, or, in the alternative, that the motion to dismiss the complaint, pending since August 9th, 1961, be brought on for hearing. On January 16th Toolco's counsel was informed that he would be given until February 1st to submit all papers in support of his motion to dismiss. On January 19th Toolco's motion to take Hughes' deposition in writing was denied. The court, however, allowed counsel for Toolco time to indicate whether he desired the place of deposition to be changed for the convenience of Hughes. No such request was ever made.

On January 23rd the Court of Appeals denied Toolco's application for a stay of the orders of January 10th and 19th.

On February 1st, on Toolco's appeal from an order of the Special Master, the court affirmed that order, and directed that Toolco produce certain tax documents to TWA on a daily basis up to February 11th.

On February 6th a hearing was held on Toolco's motion to dismiss the complaint. The motion was denied from the bench with an indication that the formal opinion would be filed the following day. The denial of the motion embraced a finding that the court had jurisdiction of the claims. Toolco was granted a stay of deposition-discovery proceedings until 5 p.m. on February 8th, to afford it an opportunity to apply to the Court of Appeals for a further stay pending an application for a writ of mandamus.

The formal opinion of February 7th, 214 F.Supp. 106, denying Toolco's motion to dismiss the complaint, pointed out that the grounds urged for a dismissal existed and were adverted to in the original notice of motion filed on August 9th, 1961, and served several weeks prior to the assignment of this case for all purposes, pursuant to rule 2 of the general rules of this court. The court indicated that counsel for Toolco could just as well have argued the motion at the inception of the litigation, instead of waiting until the taking of the deposition of Hughes was imminent.

A pretrial conference was held on Friday, February 8th, at 5 p.m., on information that counsel for Toolco was not going to proceed with the deposition proceedings of Hughes on the following Monday. Toolco did not apply to the Court of Appeals for a stay pending an application for a writ of mandamus, but, rather, submitted a "Notice of Position" to the court at the time of the hearing. In essence, this document stated that because of the enormous expenses that would be incurred in further pretrial and trial proceedings, which in Toolco's belief would exceed the amount of damages provable by TWA under the complaint, Toolco decided to rest on the merits of its position, so that the Court of Appeals would have an opportunity to rule upon the propriety of the denial of the motion to dismiss the complaint.

At the hearing counsel for Toolco stated that he had advised his client of the sanctions available to TWA under rule 37, and that by insisting upon a right to obtain a review of the legal questions involved in the proceedings to date Toolco understood that it might be deprived of further defending on the merits. Counsel referred to this as a "business decision."

Counsel for Toolco specifically stated that Hughes would not appear for deposition on February 11th and that if it were necessary to clarify the record everyone could gather on the following Monday (February 11th) to

> "note the fact that the Tool Company is failing in [sic—and?] refusing to produce Mr. Hughes, and then you can have your record and you can take your remedy on it."

Counsel also stated that he did not intend to further litigate the counterclaims until after a determination of a complaint filed by Toolco with the Civil Aeronautics Board on February 6th which includes some of the allegations of the counterclaims.

Embraced within the refusal to proceed with the deposition of Hughes is the refusal to obey the orders of the court directing Toolco to produce the documents referred to above.

On the basis of this record TWA made the motion now before the court. It is clear that the deposition of Hughes is essential for the proper presentation of TWA's case. It is also clear that the failure of Hughes to appear on February 11th for his deposition was the result of a clear and studied determination by Toolco after all efforts to postpone the appearance of Hughes had failed. The default was deliberate and willful and justifies the court in entering a default judgment as provided in rule 37(b) (2) (iii) and 37(d). A judgment by default shall be entered in favor of TWA against Toolco, and the counterclaims asserted by Toolco against TWA shall be dismissed with prejudice.

That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir.), cert. denied, 323 U.S. 718, 65 S.Ct. 47, 89 L.Ed. 577 (1944); cf. Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60 (2d Cir. 1963).

Before entering the final judgment a hearing must be held to determine the amount of damages to be awarded TWA since the damages are unliquidated. Therefore, pursuant to rule 55(b) (2), the question of the amount of the damages to be paid by Toolco to TWA is referred to J. Lee Rankin, the Special Master heretofore designated by the

court, who has presided over the deposition-discovery p
ceedings for the past year.

TWA has also requested that Toolco divest itself
its 78% stock interest in TWA. The propriety of granti
this prayer for relief will be determined by the court

The determination of the application by TWA for
injunction will be held in abeyance pending the entry
the final judgment.

The application to sever the action against Holliday
been withdrawn on his election to be individually bou
by the defaults of Toolco. Consequently, the applicati
for a default judgment is deemed to include a requ
for similar relief against this defendant, and the dis
sition of this motion as to Toolco is also dispositive
to Holliday.

I am of the opinion that this order involves a controlli
question of law (see Pan American World Airways, I
v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed
325 (1963)) as to which there is a substantial ground
difference of opinion. Enormous expense has already b
incurred in this litigation, and the hearings before
Special Master on the question of damages, with a potent
recovery of $135,000,000 on the first two claims and $1
000,000 on the third claim, may well be prolonged. An i
mediate appeal from this order is justified, since it m
materially advance the ultimate termination of this l
gation.

So ordered.

C.

332 Federal Reporter, 2d Series 602

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

Nos. 150, 151, Dockets 28405, 28406.

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellee,*

v.

HOWARD R. HUGHES, *Defendant,*

and

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants-Appellants.*

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellee,*

v.

HOWARD R. HUGHES and RAYMOND M. HOLLIDAY, *Defendants,*

and

HUGHES TOOL COMPANY, *Defendant-Appellant,*

and

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, ET AL., *Additional Defendants-Appellees,*

and

ERNEST R. BREECH, *Additional Defendant.*

Argued Nov. 13, 1963.
Decided June 2, 1964.

Before LUMBARD, Chief Judge, and KAUFMAN and HAYS, Circuit Judges.

LUMBARD, Chief Judge:

These separate appeals, heard together, are from two orders of the United States District Court for the Southern District of New York in the same case. In the first appeal, No. 28405, the defendants, Hughes Tool Company (Toolco) and Raymond M. Holliday, Toolco's chief financial officer,

attack the validity of an order which granted default jud ment in favor of the plaintiff, Trans World Airlines, In because of the defendants' failure to produce Toolco managing agent, Howard R. Hughes, for examination a their failure to produce certain papers and documents, F.R.D. 604 (S.D.N.Y. 1963). In the second appeal, N 28406, Toolco attacks an order which dismissed with pre udice its first five counterclaims against TWA and a grou of additional defendants and an order of the same da which granted summary judgment in favor of TWA on t sixth counterclaim.

TWA's complaint charged the defendants with a varie of violations of the antitrust laws as well as with havi committed willful and malicious injury to TWA's busine and sought divestiture of Toolco's interest in TWA, injun tive relief, and money damages, trebled with respect to t antitrust violations. On May 3, 1963, Judge Metzner o dered the entering of a default judgment in favor of TW against Toolco[1] but referred to a special master the iss of damages, on TWA's claim of $35,000,000 which the an trust statute would treble, and retained for further consi eration the question of divestiture. Judge Metzner d certify under 28 U.S.C. § 1292(b) that immediate appeal w justified inasmuch as a controlling question of law was i volved and hearings on the question of damages might prolonged. We granted leave to appeal limited to two que tions: first, whether the district court lacked jurisdiction the treble damage action by reason of primary jurisdictio over these matters residing in the Civil Aeronautics Boar and second, whether the issuance of certain orders by t CAB permitting the defendant to take certain actions co stitutes a good defense to the antitrust action. Thus t

[1] Due to the relationship of the parties, the district court accept the election of defendant Holliday, an officer and director of Tool to be bound by Toolco's decision to forego further discove proceedings.

propriety of the court's entering a default judgment against the defendants with respect to the complaint is not before us and we consider it only in connection with the court's dismissal of the five counterclaims asserted by the defendants. The second appeal is taken as of right from a final judgment which dismissed Toolco's first five counterclaims and granted summary judgment to TWA on the sixth counterclaim.

Background of the Litigation

An understanding of the issues requires a preliminary statement of certain background facts set forth in the pleadings and which on this record and in view of the default of the defendants we must take as established.

Commencing about five years after TWA was organized in 1934, Toolco, which at all times has been 100 percent owned and controlled by Howard Hughes, began to purchase TWA common stock, and by 1944 it held 45 percent of this stock. By 1958 Toolco had increased to 78 percent its interest in TWA's common stock; from 1944 until December 1960 it nominated a majority of TWA's directors.

Since 1955 the commercial air industry has largely converted to the use of jet aircraft. TWA's competitors began in that year to aid in the development of and to purchase jet planes. Prior to 1955 Toolco had entered into an arrangement with the General Dynamics Corporation (Convair) for the joint development of jet aircraft, but in that year the two companies terminated the arrangement. Toolco had also entered into a plan whereby it would develop and manufacture its own jet aircraft for sale or lease to TWA and its competitors. That plan was abandoned during 1956. During this period, Toolco arranged for the purchase on its own account of jet aircraft from Convair and the Boeing Company, these arrangements providing that Toolco could assign to TWA its rights to such aircraft.

Despite repeated requests by TWA, Toolco refused to assign any planes to TWA during the period 1956 to 1960. The only jet-powered aircraft which the defendants permitted TWA to use during this period were leased on a day-to-day basis by Toolco to TWA during 1959 and 1960 on the condition that TWA would not purchase or lease aircraft from any other potential supplier.

At some time prior to May 1960 Toolco and Atlas Corporation, which owns a controlling stock interest in Northeast Airlines, entered upon a plan to have Northeast propose to TWA a merger of the two air carriers. In November 1960, while the proposed merger plan was pending, Toolco diverted to Northeast six of the Convair jet aircraft which by previous agreement it had assigned to TWA.

The defendants pursued a continuous policy of refusing to permit TWA to undertake equity financing except on the condition that Toolco increase its equity position in TWA; as a result TWA was limited to obtaining funds through debt financing. When in 1960 Toolco and Hughes finally agreed to outside financing for TWA, the cost of such financing had risen greatly and the financing could be arranged only on less favorable terms than had theretofore been available, terms which had been secured by TWA's competitors. Under the 1960 financing arrangement Toolco's stock in TWA was placed in a voting trust.[1a] The CAB approved this financing arrangement and the voting trust on December 29, 1960, finding that these arrangements

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[1a] The commitments of the various lending institutions had been conditioned upon the continuation of satisfactory TWA management. The lenders reserved the right to insist upon a voting trust during the term of the loan in the event of a change in TWA management which they deemed to be adverse to TWA's credit position. When Charles Thomas abruptly resigned as president of TWA in July 1960 the lenders offered to effect the transaction if Toolco agreed to place its stock in TWA in a voting trust. In December 1960 Toolco executed the voting trust agreement.

were in the public interest. Thereupon, the Metropolitan Life Insurance Company and the Equitable Life Assurance Society loaned TWA $92,800,000 and a group of banks for which the Irving Trust Company acted as agent loaned TWA $72,000,000. In March 1961 TWA's Board of Directors authorized the purchase of 26 Boeing jet aircraft. Thereafter the defendants continued their attempts to have TWA purchase from Toolco jet aircraft which Toolco had previously agreed to purchase from Convair. The defendants have also continued to press their demand for a merger of TWA and Northeast and have otherwise, despite the existence of the voting trust, attempted to prevent TWA from acquiring jet aircraft other than from Toolco.

THE FIRST APPEAL—Docket No. 28405

TWA's complaint alleges that the facts heretofore stated constitute violations of the Sherman and Clayton antitrust acts, insofar as the defendants have attempted to monopolize a substantial segment of interstate and foreign commerce and trade, have required that TWA boycott all suppliers of aircraft other than Toolco, and have agreed to provide financing and to sell aircraft to TWA on the condition that TWA not purchase or lease the goods of a competitor. The defendants assert that the Civil Aeronautics Board possesses primary jurisdiction over these matters and in the exercise of its powers has approved all of the transactions alleged in the complaint and thereby immunized the defendants from the operation of the antitrust laws. Judge Metzner held that nothing in the Federal Aviation Act precludes the district court from asserting jurisdiction in this case and that the CAB's approval of various transactions between TWA and Toolco did not confer immunity upon the defendants from the operation of the antitrust laws. We agree.

The proposition has so often been stated that it has become hornbook law that immunity from the operation of the

antitrust laws is not lightly to be inferred from the enactment of a regulatory statute. See Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945). Yet Congress may effect such a design through explicit enactment of an immunizing provision, and Congress has done so on occasion.[2] Under § 408(a) (6) of the Federal Aviation Act, 49 U.S.C. § 1378(a) (6), no person engaged in any phase of aeronautics[3] may lawfully acquire control of any air carrier without the prior approval of the CAB. Section 411 empowers the Board to order any air carrier to cease and desist from "unfair or deceptive practices or unfair methods of competition." Section 414 of the Act provides that any person affected by any order made under § 408[4] "shall be, and is hereby, relieved from the operation of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

In attempting to ascertain the extent of the antitrust immunity conferred by the Aviation Act we do not explore wholly uncharted territory. In Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (Panagra) a case upon which all parties in this litigation principally rely, the Supreme Court considered the extent to which the Aviation Act has granted

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[2] See, e. g., Clayton Act § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958); Shipping Act § 15, 39 Stat. 734 (1916), 46 U.S.C. § 814 (1958); Interstate Commerce Act § 5a(9), 62 Stat. 473 (1948), 49 U.S.C. § 5b(9) (1958).

[3] In Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944), the Board determined that Toolco was engaged in a phase of aeronautics and thus subject to Board action under § 408.

[4] Section 414 applies to 49 U.S.C. § 1379 (interlocking relationships) and 49 U.S.C. § 1382 (pooling and other agreements) as well as to § 408.

the CAB jurisdiction over matters involving the commercial aviation industry which might otherwise constitute antitrust violations.

Pan American, a major airline in interstate and foreign commerce, and W.R. Grace & Co., a common carrier, were charged in a civil action brought by the United States with violations of the antitrust laws arising from their relations with Panagra, an airline which had been formed by Pan American and Grace, each of which owned 50 percent of its stock. The government's complaint alleged restraints of trade in that Pan American and Grace had agreed that Panagra would have the exclusive right to traffic along the west coast of South America free of Pan American competition and that Pan American would enjoy the exclusive right to traffic in other areas in South America and between the Canal Zone and the United States; that Pan American and Grace had conspired to monopolize and did monopolize air commerce between the eastern coastal areas of the United States and western coastal areas of South America and Buenos Aires; and that Pan American had exercised its 50 percent control over Panagra to prevent it from securing authority from the CAB to extend its service from the Canal Zone to the United States.

The district court found a single violation in Pan American's activities with regard to the extension of Panagra's routes and ordered divestiture of Pan American's stock interest in Panagra. On direct appeal from the district court, the Supreme Court reversed the lower court judgment on the ground that the questions presented by the government's complaint had been entrusted to the CAB and the district court therefore lacked jurisdiction in the premises.

Noting that those aspects of antitrust problems entrusted to the Board are "but a fraction of the total," the Court emphasized that the limitation of routes, the division of territories, and the relation of common carriers to air car-

riers are "basic to [the] * * * regulatory scheme" of the Federal Aviation Act and that the acts charged in the government's complaint are "precise ingredients of the Board's authority." The term "unfair methods of competition" in § 411, the Court noted, must gather meaning from the context of the regulatory scheme envisioned in the Act, and it would be strange if the "public interest" standard incorporated into § 411[5] was deemed satisfied by the Board as to a particular transaction and yet that transaction was violative of the antitrust laws; it would be equally strange for a transaction approved under § 408 by the Board to be adjudged subsequently to be in violation of the antitrust laws.

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[5] Title 49 U.S.C. § 1302 provides:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognise and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The promotion of safety in air commerce; and

"(f) The promotion, encouragement, and development of civil aeronautics."

The striking dissimilarities between the operative facts in Panagra and those in the instant case as well as the whole tenor of the Supreme Court's opinion compel us to the conclusion that the district court properly asserted jurisdiction in this cause. The relationship between the allegedly unlawful activities in Panagra and the scope of the Board's powers to deal with such activities was direct. Under 49 U.S.C. § 1371, it is the specific function of the CAB to certify airlines to operate on a particular route between terminal points directed by the Board. The unlawful division of territories and allocation of routes with which Pan American, Grace and Panagra were accused were therefore directly within the ambit of powers explicitly granted the Board by the Congress. To permit the courts to intrude into this area would have been, as the Court noted, to permit the erection of an independent yet parallel body of law in direct contravention of the regulatory scheme embodied in the Aviation Act.

By contrast, in the instant case TWA's complaint alleges transactions which are unrelated to any specific function of the CAB. The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party. The focus of the Board's powers in this sphere is the acquisition itself rather than the broad range of activities into which the controller may enter thereafter. Thus the plaintiff's complaint enumerates a variety of transactions over which the Board is given no explicit jurisdiction by the Act: an attempt to monopolize a substantial segment of interstate and foreign air commerce, imposition by the defendants on TWA of the condition that

the airline not purchase or lease aircraft from any supplier other than Toolco, and the tying of financing of aircraft acquisitions with the purchase of such aircraft from Toolco.

Nowhere in the Act is the Board specifically charged with the duty of monitoring each transaction which is ultimately effected between the carrier and its controller once an acquisition is approved. The Board concededly may condition its approval of a control acquisition upon such terms as it may find to be just and reasonable, and thereby retain a continuing jurisdiction over the activities of the controlling party.[6] In the exercise of this supplementary power the Board may investigate and regulate certain aspects of transactions effected between an air carrier and the controlling party. But the existence of this power—which was employed in approving Toolco's acquisition of control over TWA—hardly supports the defendants' claim that Congress placed the regulation of everything which might flow from such transactions within the exclusive jurisdiction of the CAB. The issue here is not whether the CAB may consider such matters but rather whether the federal courts have been excluded from their consideration by Congress. There is virtually no limit to the nature and variety of the transactions which fall within this category. In the absence of an explicit congressional mandate entrusting such transactions exclusively to the Board we can find no basis for declaring the federal courts to be without jurisdiction in such matters.

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[6] Section 408, provides, in pertinent part:

"Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."

In Panagra the Civil Aeronautics Board could have considered the activities of Pan American under its broad power set out in § 411 of the Act to "investigate and determine whether any air carrier * * * has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation * * *," a provision to which the Supreme Court explicitly adverted in holding that the matters there in dispute had been specifically entrusted by Congress to the Board. By contrast, the Board enjoys no such power to deal with the allegedly unlawful activities of Hughes and Toolco, inasmuch as § 411 is applicable solely to "any air carrier, foreign air carrier, or ticket agent." The limited applicability of § 411 merely underscores the limited jurisdiction conferred by Congress upon the Board to deal with the multifarious antitrust problems which may arise in the management and operation of the commercial air industry. Moreover, it is not even clear that the Board any longer possesses any jurisdiction over the activities of Hughes and Toolco, even under § 408 of the Act, inasmuch as the voting trust arrangement adopted in 1960 appears to have ousted Hughes and Toolco from control over the operations of TWA, such control being a prerequisite to the Board's acting under § 408.

We are reinforced in our conclusion by the Supreme Court's recognition of the limitations of its holding in Panagra. Characterizing the questions presented in the government's complaint as "narrow" ones, the Court, as we have noted, emphasized that the antitrust problems entrusted by the Act to the Board "encompass only a fraction of the total." The activities here drawn into issue by TWA's complaint fall without the ambit of that small fraction of antitrust problems placed within the Board's exclusive jurisdiction.

The Aviation Act itself bears testimony that matters such as those with which we are here concerned were not intended to be placed without the competence of the federal judiciary.

Title 49 U.S.C. § 1506 declares that "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Moreover, the Act fails to empower the Board to grant the very relief principally sought by the plaintiff in this action —the award of money damages, trebled under the mandate of the antitrust laws.

Even if we were to view as the subject of judicial discretion the question whether the CAB is to be given primary jurisdiction in the consideration of activities such as those here alleged, we could find no compelling reason to adopt such a course on the facts presented. While the entire regulatory scheme of the Federal Aviation Act demands that the Board be given great latitude in fashioning public policy with regard to the development of the commercial air industry through the acquisition of control over air carriers—and the Board possesses a substantial expertise in these matters—there is no such necessity for a uniformity of policy with regard to the consideration of the validity of individual transactions effected between an air carrier and its controller which are alleged to be unlawful under the antitrust laws. Nor is the Board any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems. The disposition of such matters by the courts would not intrude upon the Board's function of fashioning the broad framework of control for the commercial air industry. We can thus find no warrant for adopting the position that the subject matter of this litigation was entrusted by Congress to the exclusive jurisdiction of the Civil Aeronautics Board.

Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the

ramifications of these transactions. Title 49 U.S.C. § 1384 extends such immunity only "insofar as may be necessary to enable such person to do anything authorized, approved or required by such order." As Judge Metzner noted, the Board's approval of acquisition of control by Toolco over TWA did not carry with it approval of every transaction which Toolco might choose to effect in the exercise of its control. To give § 408 such a carte blanche effect would be to pervert the entire regulatory structure of the Aviation Act. Nor can any of the activities with which Toolco stands charged be deemed to have been necessary to the exercise of its control relationship.

In its original grant of approval of the acquisition of control over TWA by Toolco,[7] the Board restricted commercial transactions between the two companies to "transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000." Over the years the Board has occasionally modified this order to permit specific intercompany transactions. In 1959 and 1960 the Board issued five such modification orders approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation. In each case, however, the Board's order states merely the specific terms of the transaction and none of the accompanying conditions which allegedly were foisted upon TWA.[8] Order No. E-13873, issued on May 15, 1959, for example, states that the modification "is desired to permit TWA to lease on an individual basis up to eleven Boeing 707-131 aircraft from Hughes as they become available, as well as to acquire from Hughes at

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[7] Transcontinental & Western Air, Inc., Control by Hughes Tool Company, 6 C.A.B. 153 (1944).

[8] See Order No. E-13542, February 26, 1959; Order No. E-13873, May 15, 1959; Order No. E-14169, July 1, 1959; Order No. E-14504, September 30, 1959; Order No. E-14877, January 29, 1960.

Hughes' actual cost a supply of spare parts, not to exceed $3,500,000 in value, which are needed for the operation of these aircraft. In addition, modification is requested to permit the lease by Hughes of up to thirty spare jet engines to TWA." The Board stated in its order that the proposed arrangements did not violate the purpose of the original restriction in the control approval and that the modification ordered was just and reasonable and in the public interest; but the Board was careful to emphasize that its action should not be deemed a determination for rate-making purposes of the reasonableness of the transactions. There is no indication whatsoever—or any reason to believe—that the Board had been given any indication of the conditions which had been attached to Toolco's agreements with TWA. The Board's approval extended only to the individual transactions involved in these orders, not to the whole range of activities which over a period of years constituted the backdrop against which these transactions were effected. There is thus no cause to hold that these individual and narrow Board orders immunized the defendants from the operation of the antitrust laws with respect to activities not specifically ruled upon by the Board.

The defendants maintain that in any event the complaint fails to state facts sufficient to establish the jurisdiction of the district court. They claim that the allegations of antitrust violations in the complaint are wholly conclusory and that the specific transactions alleged to have been effected by the defendants do not state a cause of action under the antitrust laws. We do not agree. We cannot say that the specific transactions alleged in TWA's complaint—that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco; that Toolco required TWA generally to boycott all other suppliers of aircraft; that the defendants have attempted through various means to monopolize a substantial segment of interstate and for-

eign air commerce—are on their face insufficient to support a claim of antitrust violations, a claim which surely falls within the jurisdiction of the district court. The allegations state the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce, all unlawful under the antitrust statutes. It would be particularly inappropriate to find these allegations insufficient to establish the district court's jurisdiction inasmuch as the defendants denied the plaintiff the right through pre-trial discovery to add more detail and substance to the allegations set forth in the complaint. "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80 (1957). See Dioguardi v. Durning, 139 F.2d 774 (2 Cir. 1944); Knudsen v. Torrington Co., 254 F.2d 283 (2 Cir. 1958). Of course the Federal Rules apply with equal force to suits under the antitrust laws. Nagler v. Admiral Corp., 248 F.2d 319, 322-23 (2 Cir. 1957). We are satisfied that the complaint sufficiently states a cause of action and establishes the district court's jurisdiction.

THE SECOND APPEAL—Docket No. 28406

The defendants also appeal, as of right, from orders of the district court which dismissed with prejudice their first five counterclaims asserted against TWA and a group of additional defendants and which granted summary judgment in favor of TWA on a sixth counterclaim, because of the defendants' failure to produce Hughes for examination and their failure to produce certain papers and documents. The additional defendants are the three major lending institutions which participated in the 1960 financing and voting trust agreements, certain of their officers, the

incumbent president and chairman of the board of directors of TWA, and an investment banking concern which since early in 1959 has served as TWA's principal financial adviser.

The proper consideration of this appeal requires a chronological exposition of the lengthy and complicated pretrial proceedings engaged in by the parties. Late in 1961 Judge Metzner was assigned to serve as a judge for all purposes in this litigation under General Rule 2, General Rules of the United States District Courts for the Southern and Eastern Districts of New York. By order of February 7, 1962, Judge Metzner confirmed a series of prior orders which had awarded Toolco priority in the conduct of pretrial discovery, and he then appointed J. Lee Rankin, Esq. as Special Master to supervise the conduct of the discovery proceedings.

Shortly after the filing of the answer and counterclaims on February 12, the Special Master granted Toolco's motions to have the additional defendants produce a multitude of documents. On March 5, Judge Metzner modified the February 7 order so as to limit Toolco's priority in discovery to evidence which bore on the plaintiff's claims against Toolco. The March 5 order stated that "The additional defendants may participate in such depositions conducted by plaintiff, in furtherance of their own deposition proceedings, or may separately schedule such depositions to follow upon the completion of plaintiff's depositions." The court further ordered that upon the completion of the additional defendants' deposition proceedings Toolco could complete its own deposition proceedings.

On February 16, the Special Master had granted the motion of the additional defendants for the production of certain documents by Toolco. Toolco withheld certain of these documents on a claim of attorney-client privilege. After full consideration, the Special Master ordered the production of these documents on April 17. After affirm

ance by the district court of this order and of a second order to produce issued by the Special Master, and denial of review by this court, counsel for Toolco, in a letter to Judge Metzner on January 23, 1963, declared that Toolco would refuse to comply with any of these orders.

Meanwhile, on September 6, 1962, counsel for Toolco had accepted a subpoena calling for Hughes' personal appearance as a witness returnable on September 24, 1962. The district court later set October 29 as the date for the Hughes deposition. The court went on to adopt as its own a prior decision of the Master that in view of the close connection between Hughes and Toolco, Toolco would be responsible for Hughes' actions with respect to the subpoena, and that if Hughes failed to communicate with the Special Master he would be deemed to have acquiesced in this interpretation. No communication from Hughes was received by the Master.

On October 25, 1962, the Master granted Toolco's motion to adjourn the Hughes deposition, but set February 11, 1963, as a firm date therefor. By order of January 10, 1963, the district court affirmed the setting of this date, stating that "this date will be adhered to in the absence of extraordinary circumstances." Shortly thereafter, Toolco moved to hold the Hughes deposition on written interrogatories and to bring on for hearing its motion, pending since August 8, 1961, to dismiss the complaint for failure to state a claim upon which relief may be granted. On January 19, 1963, the district court denied the first motion.

In preparation for the Hughes deposition, the additional defendants had moved on January 9, 1963, for the production by Toolco of certain income tax returns, revenue agents' reports, accountants' work sheets and other documents which would allegedly substantiate a claim that Toolco and Hughes had been motivated by a desire to reap tax benefits at TWA's expense in their dealings with TWA concerning the acquisition of a jet-powered fleet of aircraft.

On January 22, 1963, the Master ruled that the documents were relevant to the issues in the case and that their production would not place an unreasonable burden upon Toolco. On February 1, the district court affirmed the order to produce, but Toolco failed to produce the documents, despite repeated demands by TWA and the additional defendants.

On February 6, 1963, five days before the scheduled Hughes deposition, Toolco filed a complaint with the Civil Aeronautics Board charging the additional defendants with violations of the Federal Aviation Act. On the same day Toolco moved the district court for a stay of all proceedings on the counterclaims pending disposition by the CAB of the Toolco complaint, on the ground that under the Supreme Court's decision in Panagra, filed on January 14, 1963, the Board possessed exclusive jurisdiction over the subject matter of the counterclaims. On February 6 the district court denied Toolco's motion to dismiss the complaint, 214 F. Supp. 106 (S.D. N.Y. 1963), and on February 8 it denied Toolco's motion for a stay of all proceedings on the counterclaims.

On February 8 counsel for Toolco informed the district court that Toolco had made a "business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. Consequently, counsel for Toolco stated, Hughes would fail to appear for the deposition ordered for February 11. He further stated that Toolco was aware of the sanctions which could be imposed by the district court for such a willful and deliberate failure to proceed with the scheduled discovery proceedings.

The inevitable consequence of Toolco's default in producing Hughes as a witness and in producing the documents as the court had directed was that on May 3 the district court granted the motions of TWA and the additional defendants for dismissal of the counterclaims with prejudice, under Rule 37(b) (2) (iii) and Rule 37(d) of the

Federal Rules of Civil Procedure. From the final judgments entered pursuant to that decision, and from a final judgment entered the same day granting TWA's motion for summary judgment on the sixth counterclaim, Toolco appeals.

Inasmuch as the sixth counterclaim raises issues unrelated to the first five counterclaims, we shall treat the sixth counterclaim separately.

The First Five Counterclaims

The appellants raise several contentions: first, that the district court should have granted their motion for a stay of all proceedings on the counterclaims pending disposition of the complaint which the defendants had filed with the CAB; second, that the district court should have granted the defendants a voluntary dismissal of the counterclaims without prejudice; and third, that the district court orders which directed Hughes to appear for deposition as noticed by the additional defendants, and which directed Toolco to produce the tax documents and the documents involving the attorney-client privilege, were improper.

That there was no cause for granting a stay of all proceedings on the counterclaims appears clear from the nature of these counterclaims. The first counterclaim alleges that the additional defendants and the present management of TWA improperly sought to perpetuate their control over TWA by preventing termination of the voting trust according to its terms. The second charges that Metropolitan and Equitable had acquired control over TWA in violation of § 408 of the Aviation Act. The third counterclaim is brought derivatively on behalf of TWA and asserts that the additional defendants and the present TWA management have conspired in violation of the antitrust laws to monopolize the supplying of financing to air carriers. The fourth restates the allegations of the third counterclaim and alleges that Toolco has suffered damages in excess of $77,000,000. Finally, the fifth counterclaim charges a com-

mon law conspiracy to interfere with Toolco's rights as the owner of 78 percent of the stock of TWA and to extend the duration of the voting trust beyond the period permitted by the applicable Delaware statute.

In the light of the views we have above expressed regarding the first appeal, it is plain that all of these counterclaims save the second fall beyond the scope of the CAB's exclusive jurisdiction. They deal with alleged misconduct on the part of the lending institutions in their dealings with TWA and Toolco and in no respect with matters specifically entrusted to the Board in the Act. Acts such as those alleged in all but the second counterclaim may properly be made the subject of an action in a federal district court. Inasmuch as the Board possessed no exclusive jurisdiction as to these claims, the defendants presented no adequate basis for a stay of proceedings.

As for the second counterclaim—which alleges a violation by the additional defendants of § 408 of the Aviation Act—the Board clearly possesses exclusive jurisdiction. Under that section, the Board is empowered to investigate alleged violations, and the district court was without power to adjudicate this issue. The court should have dismissed this counterclaim for lack of jurisdiction, and we direct the modification of the judgment below accordingly.

The defendants maintain that the district court should have granted a voluntary dismissal without prejudice of the counterclaims. It suffices merely to note that at no juncture in the proceedings below did the defendants request that the court grant such relief. Indeed, the very purpose for the defendants' "business decision" to terminate all pretrial discovery was to gain judicial review of the positions which the defendants had taken below.

Finally, the defendants contend that the district court's dismissal with prejudice of the counterclaims was invalid because the discovery orders upon which the district court

based its order under Rules 37(b) (2) (iii) [9] and 37 (d) [10] were improper.

We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation, and his willful and deliberate default constituted a sufficient basis under Rule 37 for the dismissal of the counterclaims with prejudice. Hughes has at all times been the sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes. Although the

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[9] Rule 37 provides:

"(b) Failure to Comply With Order.

"(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party • • • "

[10] Rule 37 provides:

"(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

defendants contend that the February 11, 1963 deposition was to be held solely for the benefit of TWA, Judge Metzner's order of February 7, 1962 made clear that the additional defendants could schedule separate deposition proceedings of their own, or in the alternative participate in TWA's deposition proceedings. On February 14, 1962, the additional defendants served notices to examine Toolco by Hughes, its managing agent. The additional defendants had the right under Judge Metzner's order to treat as their own the Hughes deposition scheduled for February 11, and it is abundantly clear from the record that they did so.

When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional defendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed. See Nasser v. Isthmian Lines, 2d Cir., 1964, 331 F. 2d 124; Link v. Wabash Railroad Co., 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962); Gill v. Stolow, 240 F. 2d 669 (2 Cir. 1957).

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put

to much delay and expense—that the defendants made a "business decision" to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation. See Handbook of Recommended Procedure for the Trial of Protracted Cases, Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, 25 F.R.D. 351 et seq. (1960).

In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year.

We are also of the view that the other two discovery orders were properly issued. After careful examination of the documents, both the Special Master and the district court determined that the attorney-client privilege claimed by the defendants as to the first group of documents had been waived as the result of the defendants' pleading advice of counsel as a defense and as the result of two affidavits, one of which was submitted to the CAB by Raymond A. Cook, one of Toolco's attorneys. As the Master noted, the Cook affidavit purports to be based upon information received by Cook as Attorney for Toolco and in many respects parallels the allegations made in the answer and counterclaims. The district court properly held that under these circumstances the affidavit constituted a waiver by Toolco of the attorney-client privilege. As for the documents concerning income tax information, there can be

little question of the relevance of this material to the litigation. The additional defendants might well have based a defense to the counterclaims upon a showing that Toolco's and Hughes' activities with regard to the financing of aircraft acquisitions by TWA were motivated by a desire to reap income tax benefits for Hughes at the expense of TWA. Of course, the test of relevance for discovery purposes is less stringent than that applied to the admissibility of evidence at trial. Moore, Federal Practice ¶ 34.10. The district court properly ordered the production of the tax documents.

The Sixth Counterclaim

The December 1, 1960 financing agreement required the subordination of prior indebtedness of TWA to Toolco, to be achieved through the issuance by TWA of interim subordinated notes in payment *pro tanto* of the prior indebtedness. TWA was then obliged to offer to its stockholders the right to purchase, at least at par, $100 million worth of subordinated debentures. The interest on both the interim notes and the debentures was set at 6½ percent. Toolco agreed to purchase the "principal amount" of the unsubscribed debentures within three business days of the close of the subscription offering. The agreement further provided that "TWA shall * * * refund the Interim Subordinated Notes * * * upon the purchase by Hughes [Toolco] of [the] Subordinated Debentures * * * and Hughes shall accept such Subordinated Debentures in any such refunding of the Interim Subordinated Notes up to the aggregate principal amount of Subordinated Debentures which Hughes is so obligated to purchase." The transaction was to be completed by TWA's turning over to Toolco the cash received from the subscription offering in addition to accrued and unpaid interest on the interim notes to the date of refunding.

The subscription offering expired on June 8, 1961. On June 13, three business days thereafter, TWA delivered to Toolco some $19 million in cash received in the offering

and nearly $81 million in unsubscribed debentures, totalling $100 million, the amount of the interim notes. TWA also paid Toolco interest on the $100 million to June 8 and interest on the $19 million through June 12. TWA paid no interest on the $81 million from June 8 through June 12 on the ground that it was substituting interest-bearing debentures for the interim notes.

In its sixth counterclaim, Toolco contends that under the terms of the financing agreement, TWA was obliged to pay interest on the interim notes to the date of refunding, June 13, and that TWA's failure to pay such interest resulted in Toolco's paying more than par value for the subordinated debentures, in violation of the terms of the agreement. We agree with Judge Metzner who found that "based on the overall arrangements between the parties, * * * it was their intention to substitute the debentures for the interim notes and that payment of double interest for the five days was not the intendment of the parties." The fact that the subordinated debentures were issued as of June 8 and bore interest from that date, in the same amount as the interim notes, indicates that the exchange for the notes was to be effective as of that date. The provision for having the closing three business days thereafter was merely to afford time for the preparation for that transaction. The most plausible reading of the financing agreement would seem to be one which eliminates the double interest for the period between June 8 and June 13 which Toolco now seeks. Judge Metzner properly granted summary judgment to TWA on this counterclaim.

Conclusion

As to the first appeal, we find that the district court had jurisdiction of the action and that the Civil Aeronautics Board orders do not constitute a good defense to the antitrust claim of the plaintiff.

The orders of the district court in the second appeal are affirmed with the exception of the order dealing with the second counterclaim. The second counterclaim is dismissed for lack of jurisdiction.

D.

379 U.S. 912

OCTOBER TERM, 1964.

November 16, 1964.

No. 443. HUGHES TOOL CO. ET AL. v. TRANS WORLD AIRLINES, INC.; and

No. 501. HUGHES TOOL CO. v. TRANS WORLD AIRLINES, INC., ET AL. C.A. 2d Cir. Certiorari granted. *Paul A. Porter, Victor H. Kramer* and *Werner J. Kronstein* for petitioners in both cases. *John F. Sonnett, Dudley B. Tenney* and *Raymond L. Falls, Jr.*, for respondent in No. 443. *John F. Sonnett* for Trans World Airlines, Inc., and *Bruce Bromley, William C. Chanler, William M. Bradner, Jr., Edward R. Neaher, John R. Hupper* and *Charles L. Stewart* for Equitable Life Assurance Society of the United States et al., respondents in No. 501. Reported below: 332 F.2d 602.

E.

380 U.S. 248

OCTOBER TERM, 1964.

Per Curiam.

HUGHES TOOL CO. ET AL. v. TRANS WORLD AIRLINES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 443. Argued March 3, 1965.—Decided March 8, 1965.

Certiorari dismissed as improvidently granted.

Reported below: 332 F.2d 602.

Chester C. Davis argued the cause for petitioners. With him on the briefs were *Paul A. Porter, Victor H. Kramer, Abe Krash, Dennis G. Lyons, Werner J. Kronstein* and *Daniel A. Rezneck.*

John F. Sonnett argued the cause for respondent. With him on the briefs were *Dudley B. Tenney, Raymond L. Falls, Jr., Marshall H. Cox, Jr.,* and *Abraham P. Ordover.*

Acting Solicitor General Spritzer, Assistant Attorney General Orrick, Lionel Kestenbaum, O. D. Ozment and *Robert L. Toomey* filed a memorandum for the Civil Aeronautics Board, as *amicus curiae.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

F.

380 U.S. 249

HUGHES TOOL CO. v. TWA.

Per Curiam.

HUGHES TOOL CO. v. TRANS WORLD AIRLINES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 501. Argued March 4, 1965.—Decided March 8, 1965.

Certiorari dismissed as improvidently granted.

Reported below: 332 F.2d 602.

Chester C. Davis argued the cause for petitioners. With him on the briefs were *Paul A. Porter, Victor H. Kramer, Abe Krash, Dennis G. Lyons, Werner J. Kronstein* and *Daniel A. Rezneck.*

Bruce Bromley argued the cause for respondents. With him on the brief for the Equitable Life Assurance Society of the United States et al. were *William C. Chanler, William M. Bradner, Jr.,* and *Edward R. Neaher.* On the brief for Trans World Airlines, Inc., was *John F. Sonnett.*

Acting Solicitor General Spritzer, Assistant Attorney General Orrick, Lionel Kestenbaum, O. D. Ozment and *Robert L. Toomey* filed a memorandum for the Civil Aeronautics Board, as *amicus curiae.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

G.

38 Federal Rules Decisions 499

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

Nov. 16, 1965.

METZNER, District Judge.

Plaintiff seeks review of so much of an opinion and order of the Special Master as fails to adopt some of the proposed interim findings of fact requested by the plaintiff.

It is unnecessary to detail the long, drawn-out history of this complicated antitrust litigation. The present problem arose after the court directed the entry of a judgment by default pursuant to Fed. R. Civ. P. 37(b)(2)(iii) and 37 (d), and appointed a Special Master pursuant to rule 55(b)(2) to determine the amount of damages.

The plaintiff, in an attempt to facilitate the hearings before the Special Master, submitted proposed interim findings of fact to formalize the basic findings which it considered flowed from the default. The plaintiff disagrees with some of the views expressed by the Special Master in his opinion and with so much of his order striking portions of the proposed findings.

In the main I agree with the exposition by the Special Master of the law and procedures to be followed by him in assessing the damages in this case. There appears to be some ambiguity in one portion of his opinion which may need clarification.

He states that:

"For the reasons indicated the defendants, at this point, do not have the right to produce evidence to try

to establish in any manner that the allegations of the complaint other than as to damages cannot be maintained."

The opinion goes on to state:

"Recognizing that it is his duty on behalf of the court to be satisfied of the liability of the defendants, as well as of the proof, according to law, of the amount of damages claimed, he must also be satisfied by a preponderance of the evidence that any damages were proximately caused". * * *

The reference to a duty "to be satisfied of the liability of the defendants" may, in light of the first quotation above, indicate a conflict in approach, although a reading of the entire opinion does not warrant such a conclusion.

The order referring this matter to the Special Master pursuant to the authority of Fed. R. Civ. P. 55(b)(2) was intended to embrace this portion of the rule:

"If, in order to enable the court to enter judgment * * * it is necessary to * * * determine the amount of damages * * * the court may * * * order such references as it deems necessary and proper".

Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D. N.Y. 1963), aff'd, 332 F. 2d 602 (2d Cir. 1964), writ of cert. dismissed, 380 U.S. 248, 85 S. Ct. 934, 13 L. Ed. 2d 817 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. Thomas v. Wooster, 114 U.S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885).

Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in the complaint (Thomson v. Wooster, supra); or where they are contrary to facts of which the court will take judicial notice (Glenn Coal Co. v. Dickinson Fuel Co., 72 F. 2d 885, 889 (4th Cir. 1934)); or where they are not susceptible of proof by legiti-

mate evidence (Cohen v. United States, 129 F. 2d 733 (8th Cir. 1942), Greeson v. Imperial Irr. Dist., 59 F. 2d 529 (9th Cir. 1932)); or where they are contrary to uncontroverted material in the file of the case (Interstate Nat. Gas Co. v. Southern Calif. Gas Co., 209 F. 2d 380, 384 (9th Cir. 1953), In re Woodmar Realty Co., 294 F. 2d 785 (7th Cir. 1961), cert. denied 369 U.S. 803, 82 S. Ct. 643, 7 L. Ed. 2d 550 (1962)). However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.

Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted.

The Special Master stated that the failure to adopt any proposed finding is not a determination that such finding

> "is false, or disproved, or that it will not be fully established by the close of the hearings on damages."

Such proposed findings are not at issue except to the limited extent noted above. The Special Master specifically stated that

> "the defendants are not allowed by the present refusal to adopt such tendered findings to contest them on the merits as they could do if there had been no default."

The matter is returned to the Special Master to proceed in accordance with these views. So ordered.

H.

308 Federal Supplement 679

UNITED STATES DISTRICT COURT
S. D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

No. 61 CIV. 2324

Dec. 23, 1969.

METZNER, District Judge.

The special master, Herbert Brownell, Esq.. has submitted his report awarding plaintiff $137,611,435.95 as damages after trebling as provided in § 4 of the Clayton Act, 15 U.S.C. § 15. The matter had been referred to him for assessment of damages following the entry of a default judgment imposed as a sanction for failure of Howard R. Hughes to appear for deposition. Trans World Airlines, Inc. v. Hughes, 32 F.R.D. 604 (S.D. N.Y. 1963). In the ensuing discussion, plaintiff will be referred to as TWA and defendants Howard R. Hughes and Hughes Tool Company as Hughes and Toolco, respectively.

Both parties have filed objections to the report. The defendants move to confirm those portions of the report which are favorable to them and move to reject those portions which are adverse to their position. If their contentions are correct, TWA is not entitled to any damages. TWA objects to the report on the ground that the amount awarded is inadequate. The maximum figure for which it contends is $510 million plus prejudgment or moratory interest of over $175 million. The respective contentions of the parties will be discussed below.

The history of this litigation, in which TWA sought damages for claimed antitrust violations, shows that it has been long and complex. It was originally instituted on June 30, 1961. On August 31, 1961, the case was assigned to me for

all purposes pursuant to Rule 2 of the General Rules of this court. Since then it has been the subject of many pretrial rulings, opinions and appeals. The sufficiency of the complaint was upheld in an opinion reported in 214 F. Supp. 106 (S.D. N.Y. 1963). In that opinion this court also ruled adversely to defendants' contention that the acts complained of were exempt from the antitrust laws by virtue of certain orders of the Civil Aeronautics Board. After the court was informed that Hughes would refuse to appear for examination, it granted TWA's application for a default judgment. 32 F.R.D., *supra*. The Court of Appeals affirmed the rulings found in 214 F. Supp., *supra*, but refused to pass upon the propriety of the entry of the default judgment. 332 F. 2d 602 (2d Cir. 1964). On March 8, 1965, the Supreme Court dismissed writs of certiorari as improvidently granted. 380 U.S. 248, 249, 85 S. Ct. 934, 13 L. Ed. 2d 817, 818. The special master and the court then made preliminary rulings as to the effect of the default judgment on the damage hearings. 38 F.R.D. 499 (S.D. N.Y. 1965).[1]

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[1] Despite these rulings defendants moved to compel TWA to come forward with evidence to preclude the finding of a fact which in effect would remove the basis of TWA's claim. In a memorandum opinion dated January 4, 1966, denying the motion, the court said:

> "A 7-inch stack of affidavits, briefs and supporting documents has been submitted in connection with this motion. After reading them and listening to defendant's extensive argument, one wonders why the case was never defended on the merits, if all that defendant contends for is true. At this late date, after the complaint has been sustained and a default judgment entered, with appeals to the Court of Appeals and a writ of certiorari dismissed by the Supreme Court, defendant now, in effect, seeks summary judgment in its favor. It asks that plaintiff come forward to negative a fact which defendant asserts as true. The shoe is on the other foot. The plaintiff has a judgment in its favor and the only limitation thereon has been spelled out in the order of the Special Master dated July 30, 1965 and the order of this court dated November 16, 1965. Together they outline the procedures to be followed before the Special Master, where the matter is properly pending. The court cannot conceive of any further reason for delay in proceeding before the Special Master until the hearings are completed."

The hearings before the special master commenced on May 2, 1966. Some 11,000 pages of testimony were taken from expert witnesses in the field of economics, engineering, finance and accounting. Over 800 exhibits containing 60,000 pages were admitted in evidence. The special master thereafter rendered a 323-page report. A hearing was held on the objections of the parties to the report. They submitted over 1,300 pages of briefs and memoranda, including a 62-page listing by defendants of 216 specific objections to the report.

At page 12 of his report, the special master states, "Despite prior rulings in the case, this [effect of the default] has been the subject of continuing disagreement between the parties in the damage hearings." I thought that this issue had been clearly disposed of in the preliminary report of the original special master, dated July 30, 1965, and in this court's opinion in 38 F.R.D. 499.

As stated in that opinion at page 501:

> "Liability is not an issue for the Special Master except in a very limited sense. The sufficiency of the complaint has already been established by the denial of defendant's motion to dismiss. 214 F. Supp. 106 (S.D. N.Y. 1963), aff'd, 332 F. 2d 602 (2d Cir. 1964), writ of cert. dismissed, 380 U.S. 248, 85 S. Ct. 934, 13 L. Ed. 2d 817 (1965). By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. Thomson v. Wooster, 114 U.S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885)."

In the present report, the special master has referred to another case, Harshman v. Knox County, 122 U.S. 306, 7 S. Ct. 1171, 30 L. Ed. 1152 (1887), which on its facts is even stronger than Thomson v. Wooster, *supra*. Without going into the details of that case, it is sufficient to quote the Court's language at page 317, 7 S. Ct. at pages 1175-1176:

> "In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and

stands as an admission on the record, of its truth by the defendant."

In the hearings before the special master, TWA did not have to present any evidence to support the well-pleaded allegations of the complaint, and defendants may not offer evidence to controvert such allegations. To the extent that they did, it will be disregarded. That opportunity was forfeited by defendants as a result of the default.

Defendants may show, however, that an allegation is not well pleaded, but only in very narrow, exceptional circumstances. The *Thomson* and *Harshman* cases clearly support this rule. For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation. Other examples, as detailed in 38 F.R.D. at 501, are allegations which are contrary to facts of which the court will take judicial notice, or which are not susceptible of proof by legitimate evidence, or which are contrary to uncontroverted material in the file of the case. That opinion went on to say:

"However, it may be shown by plaintiff, in the context of this case, that some matters of which the court may take judicial notice should not be so noticed. See McCormick, Evidence § 330 (1954). Where file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation. If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in this default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.

"Attempts by defendant to escape the effects of its default *should be strictly circumscribed.* It should not be afforded an opportunity to litigate what has already been deemed admitted in law. *In the absence of an exceedingly strong showing* that an allegation is untrue

under the rules set forth above, the allegation stands as admitted." 38 F.R.D. at 501 (emphasis added).

This quoted language had in mind the impact of the failure of Hughes to appear for deposition. His default stymied TWA in the acquisition and presentation of evidence in support of its claim. As the Court of Appeals said (332 F. 2d at 614):

> "We think it clear beyond any question, in light of all the circumstances here presented, that the deposition of Hughes was necessary to all aspects of this litigation * * *."

And again at page 615:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation."

Defendants claim that there are allegations in the complaint which are contrary to facts of which the court will take judicial notice. They particularly refer to that portion of the third paragraph of the complaint which alleges that Toolco was engaged

> "since in or about 1939 in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states for use in interstate and foreign commerce."

They request that judicial notice be taken of the fact that Toolco never "manufactured" or engaged "in the sale and lease" of aircraft. I cannot take judicial notice of these matters because they are not indisputably true.

The question whether judicial notice can be taken of facts which are not indisputable has been the subject of disagreement among scholars. Wigmore thought that notice should not be limited to indisputable facts. He took the position that the taking of judicial notice of a fact merely

relieved the offeror of more formal proof. However, this did not prevent his opponent from disputing the fact by offering contrary evidence. 9 Wigmore, Evidence § 2567 (3d ed. 1940). See also Thayer, Preliminary Treatise on Evidence 308-309 (1898); Ohio Bell Telephone Co. v. Public Utilities Comm'n of Ohio, 301 U.S. 292, 301-302, 57 S. Ct. 724, 81 L. Ed. 1093 (1937); United States v. Aluminum Co. of America, 148 F. 2d 416, 445-446 (2d Cir. 1945). The more recent thinking is that only indisputable facts such as matters of common knowledge and matters capable of certain verification will be judicially noticed. When noticed such facts are binding on the trier of the facts. Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 482-87 (1946); McCormick, Evidence § 330 (1954); McNaughton, Judicial Notice, 14 Vand. L. Rev. 779 (1961); Alvary v. United States, 302 F. 2d 790, 794 (2d Cir. 1962).

I do not have to resolve the debate among scholars concerning the taking of judicial notice during trial. It is clear to me that after a default only indisputable facts should be noticed to contradict allegations of the complaint. Otherwise a preliminary hearing would be necessary to afford plaintiff a chance to rebut factual material which a defendant claims should be judicially noticed. See the *Ohio Bell* and *Alcoa* cases, *supra*. In effect it would permit a defendant to litigate facts which are foreclosed by a default under the *Thomson* and *Harshman* cases, *supra*.

In determining indisputability, the courts will consider "the nature of the subject, the issue involved, and the apparent justice of the case." McCormick, Evidence § 330, at 709 (1954). Each of these factors counts against noticing the proposition offered by defendants. First, the subject of the proposition is not scientific, historical, geographic or statistical matter of the kind courts are most willing to notice. Instead it is a garden variety proposition about who did what, when and where. Second, the facts which defendants wish judicially noticed in this litigation would be relevant to the central issue of liability under the

antitrust laws. The more critical an issue is to a case, the more reluctant courts should be to determine it by taking judicial notice. Third, the apparent justice of the case in the posture of a default based upon wilful refusal to appear for deposition requires me to resolve all doubts against defendants.

The defendants are urging that certain facts are indisputable because they appear in orders of the CAB and material in the CAB files. While judicial notice may be taken of the existence and contents of such material, it does not follow that the court will take judicial notice of the truth or accuracy of the contents. Stasiukevich v. Nicolls, 168 F. 2d 474, 479 (1st Cir. 1948). In that case the court found that "the findings are merely evidence of the facts asserted," and went on to state that "of course, the other party may introduce evidence tending to prove the contrary of the facts asserted in the official report." Since a finding is merely evidence and is rebuttable, it cannot be considered indisputable. As to material in the CAB files, it stands on even weaker footing, since it has not been subject to any sort of examination of an adversary nature.

Defendants argue that TWA has failed to establish that it received late or inadequate deliveries of jet aircraft as a proximate result of the conduct of the defendants in violation of the antitrust laws. They assert that the claim "is defective for the further reason that the plaintiff has failed to establish by a preponderance of the evidence that, but for defendants' conduct, it would and could have accomplished the results now asserted."

It has been said of "proximate cause" that:

> "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion * * * Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly * * *." Prosser, Law of Torts 240 (3d ed. 1964).

The question of proximate cause involved in this case arises out of a distinction between the *fact* of damage and the *amount* of damage. The Supreme Court explained this distinction recently in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129 (1969):

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."

Basically defendants seek to deny that they caused *any* injury to TWA, i.e., to deny the *fact* of damages. The fact of damages, however, is an element of liability. The complaint alleges that the defendants committed certain acts which caused injury to TWA. The allegations are admitted by the default and the fact of injury is thereby established. The only question remaining is the amount of damages defendants should pay TWA.

When we come to the computation of the amount of damages in an antitrust case, we look to the rules enunciated in Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). Those rules are that the trier of the facts must use the most precise proof available, that even where a defendant by his own wrong has prevented a more precise computation, the award may not be based on speculation or guesswork, and that the award must be predicated on a just and reasonable estimate of the damage, based on relevant data.

Finally, the report must be reviewed in the light of the strong presumption in favor of the findings of fact made by the special master. They are to be accepted unless clearly erroneous. Fed.R.Civ.P. 53(e)(2); Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 689, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946); United States v. S. Volpe & Co., 359 F.2d 132, 134 (1st Cir. 1966); E. I. du Pont de Nemours &

Co. v. Purofied Down Prods. Corp., 176 F.Supp. 688, 691 (S.D.N.Y. 1959). This rule is the same as Rule 52(a), which is applicable to findings of fact made by the trial court in a nonjury case. Such a finding is clearly erroneous only where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

The complexity of the proof in this case is attested to by the nature of the testimony proffered by the parties. Intricate questions of engineering, finance and economics were involved.[2] They were reviewed and resolved with

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[2] An example of the complexities of the proof may be found in the following quotation from the report (page 94) which relates to testimony affecting only one aspect of an item of damage:

"The above formula for the B-331s was determined by a method commonly recognized by statistical experts for determining relationships between two variables, and known as regression analysis or as the method of least squares (Tr. 7805-6). As an example, by plotting on graph paper aircraft hours operated (independent variable) and amount of operating expenses (dependent variable) for several airlines, one can connect the dots on the graph with a straight line which represents an average relationship between the points. There are various standards for placing the straight lines, but the method of least squares fits the line to the various observations (dots) so as to reduce the squares of the deviations (differences) to a minimum. It produces a line showing the average of the various lines that might be fitted to the observations. If one squares the deviations and divides by the number of observations, one gets the standard error of estimate; and, given a normal distribution of errors, 68% of the observations should fall within one standard of error and 95% of the observations should fall within two standard errors. Relationships based on fewer observations tend to be more untrustworthy, and results showing a large proportion of observations outside the standard error of estimate likewise tend to be untrustworthy unless validated by independent means.

"No claim was made by Simat that regression analysis was anything more than a statistical method useful in testing the

painstaking care by a special master of extremely high competence. Especially apt here is the language of the court in Badenhausen v. Guaranty Trust Co., 145 F.2d 40, 53 (4th Cir. 1944), cert. denied, 323 U.S. 797, 65 S.Ct. 440, 89 L.Ed. 636 (1945), referring to the effect to be given to the findings of a special master who prepared a plan of railroad reorganization:

> "Especially imperative is the rule when, as here, the master has lived with the case for four years, has patiently studied the complex questions involved and has listened with painstaking care in extended hearings to the arguments and proposals of all the parties who desired to be heard."

To the same effect, see Santa Cruz Oil Corp. v. Allbright-Nell Co., 115 F.2d 604 (7th Cir. 1940).

Bearing these considerations in mind, I will first pass upon the specific objections by the defendants to the report of the special master.

Defendants' Objections to the Report of the Special Master

I. Determinations Relating to Defendants' Alleged Antitrust Violations.

A. Facts which defendants claim should have been found.

Objections 1-3 and 13. The suggested findings as to CAB approval are irrelevant to the proceedings and were so adjudged by this court on defendants' motion to dismiss (214

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validity of assumptions made by non-mathematical observations and raw data and conclusions based thereupon. Nevertheless Simat was of the opinion that the statistics produced by regression analysis under the assumptions made in his report confirmed his expert opinion as to the financial results that would have been obtained under the relevant equipment assumptions."

F.Supp. 106), which determination was affirmed by the Court of Appeals (332 F.2d 602) when it said at page 610:

> "Nor do we find any merit in the defendants' alternative contention that the Civil Aeronautics Board, in approving Toolco's acquisition of control over TWA and certain specific transactions thereafter, immunized the defendants from the operation of the antitrust laws as to all the ramifications of these transactions."

Objection 4 with 11 subdivisions. These are suggested findings based on a suggested finding that Toolco never manufactured or supplied commercial transport aircraft to United States air carriers in competition with manufacturers and suppliers of such aircraft. First, the defendants by their default admit that they did engage in such activity. Second, the suggested findings do not necessarily clearly negative liability when all the allegations of the complaint are read together. Third, there is sufficient in the record on this default to justify the refusal of the special master to so find. In this regard, reference is made to the placing of orders by Toolco for Convair 880s built to the specifications of Capital Airlines, the placing of orders for Convair 990s built to the specifications of American Airlines, the sale of Boeing 331s to Pan American and the leasing of Convair 880s to Northeast Airlines.

Objections 5-8. The suggested findings that during the period covered by the complaint Hughes did everything to explore the source of supply of jets in the best interests of TWA fly directly in the face of the alleged wrongdoing by the defendants which is admitted by the default. Additionally the record contains evidence to the effect that Hughes was not acting solely in the best interests of TWA in the development of the Model 18 by Convair.

Objections 9, 9a, 9b and 10. These are suggested findings that defendants did not engage in financing the acquisition of aircraft in competition with insurance companies, commercial banks or other lending institutions and that TWA

obtained such financing from various airplane manufacturers and banks. I fail to see their relevancy in view of the charges contained in the complaint which are, in effect, that defendants dictated to TWA the methods and means of financing the acquisition of aircraft. See paragraphs 10(g), 23, 24, 26, 27 and 28 of the complaint.

Objections 11 and 12. These are suggested findings that Atlas never manufactured or developed aircraft and submitted a proposal pursuant to an agreement with Toolco for merger of Northeast Airlines and TWA which was reported as being fair. The default admits the allegations of the complaint regarding the conspiracy and that the proposed merger was advantageous to the defendants and disadvantageous to TWA. Further, as regards TWA reports favorable to the merger, the domination and control of TWA by Hughes must be taken into consideration in evaluating such reports.

B. Findings claimed to be clearly erroneous.

Objections 14, 15 and 17 to the findings that the activity by Toolco constituted "engaging in" the development and manufacture of aircraft by Toolco. The record is sufficient to sustain these findings.

Objection 16 to the finding that Toolco was engaging in this activity when TWA should have been arranging for purchases from other suppliers. This finding is sustained by paragraphs 16, 17, 24, 25 and 26 of the complaint.

Objections 18, 19 and 20 to the findings regarding the purchase of Pratt & Whitney engines, Toolco's trading on its delivery positions as to jets and Toolco's refusal to assign to TWA its rights to acquire jets. These objections are predicated on an assumption that the findings were made after a contested trial following full pretrial discovery procedures. Obviously it is not open to defendant to claim, as it does in objection 20, that it disproved the allegations in paragraph 18 of the complaint, or that the engines were

purchased for TWA's best interests and were not resold at a profit.

Objection 21 to the finding that TWA's management was dominated by Hughes is clearly frivolous. The finding is not only admitted by the default, but was so found in 32 F.R.D. at 606 and 332 F.2d at 614.

Objection 22 to the finding that the factory representatives were Toolco employees reporting to Rummel as the representative of Toolco is captious. The record shows that Rummel was Toolco's special representative even though he received compensation from TWA. The factory representatives reported to a TWA employee, Rourke, who reported to Rummel. If Rourke had been paid by Toolco, reimbursement would have been made to Toolco by TWA as part of the cost of the aircraft.

C. Conclusions of law claimed to be erroneous.

Objections 1-12 are directed to conclusions of law made by the special master. His findings of fact have been sustained by the rulings on the objections made above. Paragraphs 9 and 10 of the complaint have been admitted by the default and defendants' judicial notice argument has been rejected. The conclusions of law are further buttressed by the opinion of the Court of Appeals that the specific transactions alleged to have been effected by the defendants state a cause of action under the anti-trust laws. 332 F.2d 602, 611. These objections are overruled.

II. Determinations Relating to TWA's Claim That It Received an Inadequate and Late Jet Fleet.

A. Facts which defendants claim should have been found.

Objections 1, 2, 3 and 4 are suggested findings similar to those in objections 6 and 7 in I A, *supra*, and are similarly disposed of. It is frivolous to claim that this record could

possibly sustain a finding that TWA was an independent negotiator.

Objection 5. The suggested finding that defendants' negotiations with Convair in 1955 did not restrain trade takes a mediate fact, meaningless without other mediate facts, and draws a negative conclusion of law out of context.

Objections 6, 7, 8, 9, 11, 12, 13, 14 and 16. These suggested findings are misleading. They state facts which assume that the conditions were not of defendants' doing. The assumption is wrong, since the state of the record on liability shows that defendants' conduct brought about the fact situation, and it is this very conduct which is the basis of TWA's complaint. Furthermore, reliance on achieving better delivery dates with an increase in orders only buttresses TWA's position that prompt action with its welfare in mind would have achieved even better results.

Objections 10 and 15. These are suggested findings that TWA equalled its domestic competitors in jet service in 1959, and in 1960 flew more transatlantic seats relative to Pan American and earned a higher operating revenue than Pan American. Assuming the suggested findings to be true, they miss the point in issue that defendants' actions prevented even better results from being achieved.

Objection 17. This is a suggested finding that TWA has failed to show that it would have ordered jet aircraft in 1955 from Boeing rather than from Douglas absent the exercise of any control by defendants. The default precludes the necessity of making any such showing.

Objections 18, 19 and 20. The suggested findings that Toolco in 1959 determined that it was advisable to reduce the planned jet fleet and that Thomas and the firm of Coverdale & Colpitts agreed are negatived by the default and are not borne out by the record.

Objection 21. The suggested finding that in the spring of 1959 TWA was in poor financial condition ignores the

allegations of paragraphs 4, 10(b), 10(g), 23, 24 and 26 of the complaint regarding Toolco's domination and control of TWA.

Objection 22. The suggested finding that it was not unusual for an airline to cut back initial jet orders covers only part of the relevant fact. The remainder is that such an airline would, and did, at the same time increase orders for other models.

Objection 23. The suggested finding that TWA has failed to show domination by defendants preventing the exercise of independent judgment by the executives of TWA completely ignores the default.

Objection 24. The suggested finding that Rummel was a middle echelon executive with no power of decision as to what equipment could be purchased by TWA ignores the record, unless it be defendants' contention that the decision as to what equipment could be purchased was lodged in Hughes.

Objections 25 and 33. The suggested findings that the decision to reduce the size of the initial jet fleet and that the administration of the Convair contract by defendants were not in restraint of trade are contrary to the admissions made by the default.

Objection 26. The suggested finding that Thomas and the board of directors of TWA ratified the transfer by Toolco of six of the Boeing 331s to TWA's competitor Pan American overlooks the admitted exercise of control and domination of TWA by Hughes.

Objection 27. The suggested finding that the transfer was not in restraint of trade is contrary to the admissions made by the default.

Objections 28, 29 and 29A. These are suggested findings that TWA has failed to show that absent control by defendants it would have ordered 63 jets, that it could have financed such fleet and obtained earlier delivery dates.

The default precludes the necessity of making any such showing.

Objections 30, 31 and 32. These are suggested findings that failure to meet the delivery schedule of the Convair 880s was not defendants' responsibility, that such delay was attributable to Convair, even after January 1961. The suggested findings are contrary to the admissions inherent in the default and to the testimony in the record.

Objection 33. The suggested finding that TWA has failed to show that defendants' administration of the Convair contract unreasonably restrained trade ignores the effect of the default.

B. Findings claimed to be clearly erroneous.

The objections under this subdivision are numbered 34 through 74. In the main, the findings attacked are just the opposite of what defendants claim the special master should have found as set forth in objections 1 through 33 in II A above.

The findings made by the special master which are referred to in this subdivision are not clearly erroneous. As to objection 56 to the finding that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages, I refer to the discussion of the *Bigelow* case, *supra*. Many of the findings are clearly established by the admissions inherent in the default. Others rely on disputed evidence in the record, but obviously this does not require their rejection under the "clearly erroneous" rule. In addition to these comments for overruling the objections, I refer to specific comments made in ruling on objections 1 through 33 in II A above.

C. Conclusions of law claimed to be erroneous.

Objections 1, 2 and 3 have been disposed of in the discussion of proximate cause and the *Bigelow* case, *supra*. The remaining objections 4 through 14 are directed toward

conclusions of law which are amply supported by the findings of fact sustained by the above rulings.

III. Determinations Relating to TWA's Claim That It Was Injured by Leasing Jet Aircraft from Toolco.

A. Facts which defendants claim should have been found.

Objection 1. The suggested finding that the leases of jets in 1959 and 1960 were made pending consummation of permanent financing disregards the admissions of the allegations in paragraph 20 of the complaint.

Objections 2 and 3. The suggested findings that the leases were approved by the CAB and did not disclose any restrictions in acquisitions by TWA are subject to the same rulings made on objections 1-3 and 13 in I A above. The leases were between Toolco and its controlled TWA.

Objections 4 and 5. The suggested findings that there is no evidence that the rentals were unreasonably high and that Toolco received no rental until December 30, 1960 are immaterial.

Objection 6. The suggested finding that there is no testimony that TWA would have purchased rather than leased the jets absent the alleged conduct of defendants in violation of the antitrust laws is subject to the same ruling made with regard to objection 17 in II A above.

B. Findings claimed to be clearly erroneous.

Objection 7 to the finding that the leased jets were the first made available to TWA by defendants during the years 1955 to 1960 is overruled because there is no such finding.

Objection 8 to the finding that the leases were made with the understanding that TWA would not lease or purchase jets from other potential suppliers is overruled because of

the admission of the factual allegations of paragraph 20 of the complaint.

Objections 9, 10 and 11 refer to statements of contentions by the special master and are not findings.

C. Conclusions of law claimed to be erroneous.

Objections 1 through 5. In view of the rulings and comments on the objections referred to in A and B of this part, the conclusions of law made by the special master, referred to in objections 1 through 4, are correct. Objection 5 to the use of interest cost of capital is more an objection to a finding of fact and is overruled because the finding is not clearly erroneous.

IV. Determinations Relating to TWA's Claim for Lost Operating Profits.

A. Facts which defendants claim should have been found with reference to the International Division.

Objections 1, 2, 3 and 4. These are suggested findings that TWA has failed to prove damage in this category based on assumptions of TWA's expert. They are predicated on finding that the figures of defendants' experts are correct. The refusal to make such findings was not clearly erroneous.

Objection 5 is a suggested finding that there is no evidence in the record to justify an assumption that TWA would have leased Boeing 331s to Northeast in October and November 1959. The assumption made by TWA's expert was justified on the facts as to the time of year and passenger demand.

B. Findings claimed to be clearly erroneous with reference to the International Division.

Objection 6 is to the finding that there would be an $89.3 million increase in operating revenue. This finding is not clearly erroneous.

Objections 7 through 7j. These objections except 7i are directed to findings as to the "competitive response" which defendants' expert relied on in his computations. The findings are supported by the record and are not clearly erroneous. Objection 7i is to the finding that TWA's comparative shortage of jet equipment caused it to lose its market position. The finding is supported by the record.

Objection 8 is to the finding relating to "beyond-the-gateway and charter service passengers." This finding is supported by the record.

Objections 9, 9a and 9b. These objections disagree with the special master's findings as to operating costs. The findings are supported by the record.

C. Facts which defendants claim should have been found with reference to the Domestic Division.

Objection 1. The suggested finding that there is no evidence that TWA would have leased four Boeing 720Bs or bought 18 Boeing 131Bs would not be a correct finding. The record justifies the opposite finding made by the special master.

Objection 2. The suggested finding that TWA has failed to prove that its net operating profits would have increased is predicated on accepting defendants' evidence. The conflict in the evidence was for the special master to resolve and his contrary finding is supported by the evidence.

Objection 3 is a suggested finding that TWA has failed to prove that its average rate of capacity could have been maintained with an added jet capacity. The suggested finding relies on the testimony of defendants' expert which the special master was entitled to reject.

Objection 4 is a suggested finding that in the 1959-1963 period there was an acute overcapacity which alarmed the CAB as well as the airline industry. The suggested finding

does not affect the fact that under proper conditions TWA would have been able at least to maintain its competitive position in relation to other carriers. See chart at page 138 of the report.

Objection 5 is a suggested finding that as airlines added jet capacity in 1959-1963 the load factors steadily declined. The implication of this suggested finding disregards the fact that with an adequate jet fleet TWA's position would have been different. See page 133 of the report.

D. Findings claimed to be clearly erroneous with reference to the Domestic Division.

Objections 6 and 13 to the findings as to increased transportation revenues and increased operating costs are overruled. The findings are supported by the record.

Objections 7 and 8 are to the findings as to TWA's shortage of jet equipment. The findings are supported by the record.

Objections 9, 9a and 9b to the findings using the average annual load factor in estimating added traffic are overruled. See comments on the immediately preceding objections 3-5.

Objection 9c. The objection does not encompass the complete finding of the special master.

Objection 9d. The finding objected to is correct in the context used by the special master.

Objections 10, 10a, 10b, 10c, 10d, 10e and 10f. These objections go to findings by the special master in which he refused to accept defendants' testimony as to "marginal load" factor as opposed to accepting TWA's testimony as to "annual average load factor." Here again there is present a conflict of testimony which the special master was justified in resolving as he did. See the findings to which objections 9, 9a and 9b immediately above are directed.

Objection 11 is to the finding that TWA testimony adequately takes into account changes in stage lengths accompanying the introduction of jets. The special master simply resolved the conflicting testimony on this subject and his finding is supported by the record.

Objections 12 and 12a. Here again the objections are predicated on the refusal of the special master to accept the testimony of defendants' expert as opposed to that of TWA's expert. The objections are overruled.

E. Fact which defendants claim should have been found with regard to the added cost of operating the Boeing 331s.

Objection 1. The suggested finding that there would have been increased costs in operating five 331s over the actual cost of operating five 331Bs which were leased is predicated on accepting defendants' testimony. The special master was justified in refusing to do so for the reasons stated in the report.

F. Facts which defendants claim should have been found with regard to mitigation of damages.

Objections 1 and 2. These are suggested findings that Toolco offered TWA four Convair 880s in 1961 which TWA refused and that TWA could have acquired additional jets in 1961-1963, which it failed to do. The suggested findings completely ignore the existence of the new management of TWA, its problems with defendants at the time, and its business judgment to concentrate on Boeing planes for the best interests of TWA.

G. Finding claimed to be clearly erroneous with reference to mitigation of damages.

Objection 3 to the finding that the purchase of four Convair 880s was not feasible as a business matter is overruled. See comment on the immediately preceding objections 1 and 2.

H. Conclusions of law claimed to be erroneous.

Objection 1. The import of the conclusion as set forth in this objection does not appear in the report.

Objection 2. The application of the standards of proof set forth in the *Bigelow* case, *supra*, is proper.

Objection 3. The special master was justified in accepting the testimony of TWA's expert.

Objections 4, 5 and 6. The special master acted properly with regard to the matters to which these objections are made.

Objection 7. This objection ties in with objection 1 in E immediately above and is similarly disposed of.

Objection 8. This objection does not correctly reflect the cited page of the report. The conclusion reached by the master there was proper.

V. Determinations Relating to TWA's Claim for Disruption of Its Business.

A. Facts which defendants claim should have been found.

Objection 1. The suggested finding that the defendants were not responsible for late deliveries of the 880s has been rejected above (II A, objections 30-33).

Objection 2. The suggested finding that TWA was not subject to expenses it would not otherwise have incurred is not sustained by the record.

Objections 3, 4, 5 and 6. These are suggested findings that TWA was not damaged by reason of certain payments made to maintenance instructors and crew members, or costs allocated for use of a simulator and transition training plane. The suggested findings overlook the fact that TWA was paying for enforced idleness and refresher training made necessary by the delays. These are proper items of damage.

VI. Determinations Relating to the Computation of the Amount of the Damage Award.

A. Facts which defendants claim should have been found.

Objections 1 and 2. The suggested findings relate to a $12.3 million increased cost of capital on advance deposits and progress payments for the reconstructed fleet. The special master explained that to make such findings would "involve elaborate calculations and several speculative assumptions." The suggested findings are not supported by the record.

Objection 3. The suggested finding regarding the cost of purchasing the theretofore leased jets is incomplete and misleading standing alone.

B. Findings claimed to be clearly erroneous.

Objection 4 is to the finding refusing to make provision for increased cost of capital on advanced deposits and progress payments. The finding is merely the opposite of what defendants claim should have been found as detailed in objections 1 and 2 in IV A above. The objection is overruled.

Objection 5 is to the finding which added interest cost on advance deposits for twenty 880s to TWA's capital base. The finding is not clearly erroneous.

Objections 6 and 7 are to the findings excluding capital expenditures for ratable parts, expendable parts and construction work. The findings are not clearly erroneous.

Objection 8 is to the finding limiting to the years 1959 and 1960 the increased interest cost of owning instead of leasing the jets. The special master was justified in making the finding.

C. Finding claimed to be erroneous regarding the use of TWA Exhibit 50.

Objection 1 is to the finding that the principles of combination and adjustment used by TWA's expert were proper. The special master was justified in making this finding.

D. Conclusions of law claimed to be erroneous.

Objection 1 is to the use of the external borrowing rate and is overruled.

Objection 2 relates to objection 4 in VI B above and is overruled.

Objection 3 to the adjustments of TWA's historical financial statements is overruled.

TWA's Objections to the Report of the Special Master

TWA has filed objections to the report on the following grounds:

1. The award as a whole is inadequate.

2. The special master erred in rejecting TWA's comparative profit measure of damages.

3. The award on TWA's claim for losses in operating profits is inadequate.

4. The award on TWA's claim for losses due to leasing jets from Toolco is inadequate.

5. The special master erred in denying damages for losses connected with financing the jet fleet.

6. The special master erred in denying damages for losses due to delay in disposing of the displaced piston aircraft.

7. The special master erred in finding that TWA is not entitled to an award of prejudgment or moratory interest.

I. Inadequacy of Total Award.

The contention that the award as a whole is inadequate is predicated on a claim that it permits the defendants to retain the fruits of their wrongdoing.

Toolco is alleged to have acquired its stock interest in TWA at a cost of $94 million. On May 3, 1966 it sold this stock for a net price of $545.8 million, with a resulting profit of $452 million. After payment of the 25% capital gains tax, the net profit after taxes is calculated at $339 million. I am advised that any judgment for damages in this case is fully deductible from current income for tax purposes. Therefore, on the award recommended by the special master, the ultimate cost to Toolco of paying such award would only be $75 million, leaving Toolco with a net profit of $265 million. TWA claims that Toolco should not be permitted to retain this amount since it violates the theory of unjust enrichment.

The fallacy in the application of this theory to this case is that the profit on the sale of the stock is not attributable to the illegal acts of the defendants. Defendants' control and domination of TWA ended on December 30, 1960. TWA does not seek damages for the period subsequent to 1963 because it claims that by the end of 1963 the ill effects of defendants' control had been eliminated. At that time the stock was selling at about $32 a share compared with $86 a share at the date of sale. Therefore, the high value that the TWA stock reached in 1966 had nothing to do with the acts of the defendants. There is no dispute that Toolco's acquisition of the controlling interest in TWA was legal. It was the improper exercise of control that is attacked by the complaint. 214 F.Supp. at 109-110. What TWA seeks under this objection is not damages based on unjust enrichment flowing from the acts of the defendants, but rather punishment not within the contemplation of any accepted measure of damages. The cases relied on by TWA (*Bigelow, supra;* Southern Pacific Co.

v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451 (1918); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968)) are not in point, since they speak of the unfairness of permitting a defendant to retain the profits flowing from his illegal acts.

This objection is overruled.

II. The Comparative Profit Measure of Damages.

TWA claims that the special master erred in not using its comparative profit studies as the measure of damages. One such study showed losses to TWA of approximately $170 million. Another showed losses of $121 million. TWA advanced a second measure of damages based on specifically computed losses claimed to flow from the defendants' conduct. The special master proceeded on this theory, but only awarded $45 million of TWA's claim of $105 million.

The first argument to support the comparative profit measure of damages is related to TWA's claim of unjust enrichment. Since the unjust enrichment theory has been rejected, this argument for the use of comparative profit studies fails.

TWA then argues that the comparative profit study is a proper and standard method of measuring damages without regard to the amount that it would produce. The special master rejected the comparative profit studies because there was a more precise method of ascertaining damages, which was the method he used. Further, he found that the comparative profit study was based on indefinite allegations of the complaint. The method he used was predicated on more specific allegations of the complaint. TWA's reliance on *Bigelow, supra,* for the use of the comparative profit measure of damages is misplaced. In that case the Court found at page 266 of 327 U.S. at page 580 of 66 S.Ct. that it was proper to use comparative receipts to measure damages because the defend-

ants' "wrongful action had prevented petitioners from making any more precise proof of the amount of the damage."

This objection is overruled.

III. Inadequacy of Award for Losses in Operating Profit.

TWA complains that in determining the "cost of capital" factor in computing operating profit the special master erred in using 6% for 1959 and 6.3% for 1960. If the jet fleet had been available for use by TWA at the times it should have been, TWA would have needed capital at those times to finance the purchase of the jets. The interest paid for borrowing the money would be a cost factor to be added to other operating expenses each year, and would be offset against the expected receipts to determine the operating profits that would be realized if there had been an adequate jet fleet.

The special master first determined the amount of money that had to be available beginning in 1959 to finance the purchases based on the "reconstructed" delivery dates of the aircraft. He then applied TWA's historical external borrowing rate at those times to arrive at the yearly cost of capital.

TWA contends that it was error to use this rate because its financial condition and the program of financing it followed were the result of the illegal acts of the defendants. It claims that if it had been free of restraint it could have undertaken financing in 1955, and that the maximum cost of borrowing would have been only the 4¾% paid by its competitors in 1955 and 1956 rather than the 6 to 6½% it paid in 1960.

The use of the lower rate for "cost of capital" would increase the operating profits found by the special master for the years in question, and would result in an increase

of $4.9 million (before trebling) in the award for this item of damage.

The special master rejected TWA's theory of damage on losses connected with financing the jets (see V below). Included in that loss was a projected cost of capital predicated on what TWA might have done in the area of financing in 1955. In view of this ruling, the rate of interest paid by competitors in 1955-1956 is not the true measuring rod. Rather, the rate paid by competitors in 1959 and 1960 is the more accurate figure. The record shows that it ranged from 5 to 6½%, not significantly different from the 6 and 6.3% rate used by the special master.

This objection is overruled.

IV. Inadequacy of Award for Losses Due to Leasing Jets from Toolco.

TWA seeks an increase of $1.6 million (before trebling) in the award for this item of damage. What has been said in III above applies equally as well to this objection. This objection is overruled.

V. Refusal to Award Damages for Injuries Alleged to Have Been Suffered in Financing the Jets.

It is the claim of TWA that the illegal acts of defendants with respect to financing the acquisition of jets by TWA caused it damage in the amount of $30 million. The claimed damage is based on the difference in its cost under the program which it was forced to adopt and a plan which it claims an independent TWA would have adopted. TWA offered expert testimony by Drexel Harriman Ripley, Inc., a firm of investment bankers, as to what an independent TWA would have done to provide adequate financing for the jet age. Defendants countered with their expert, Loeb, Rhoades & Co., a firm of investment bankers.

The special master reviewed the conflicting testimony in detail in pages 186 through 264 of his report. TWA claimed it would have undertaken financing operations in May 1955, October 1955 and May 1959. It appears that the latter two financings depended on "the prudence and doability of the May 1955 equity financing."

The special master referred to the standards of the *Bigelow* case (see page 12 of this opinion) and also noted that he was aware that TWA's financial condition in 1955 reflected the influences of Toolco. He then stated (page 258 of the report):

> "However, after careful deliberation, I have determined that TWA has not established that a prudent and competent management of TWA acting independently and free of any control or interference on the part of Toolco would and should have calculated in the spring of 1955 the amount of the financial requirements of TWA for the jet aircraft age. It is also my determination that an independent and prudent TWA management would not have accepted the recommendation of Drexel Harriman Ripley that TWA sell in May 1955 $55.5 million (net proceeds) in common stock of TWA.
>
> "For me to find to the contrary would in my opinion endow Drexel Harriman Ripley and an independent prudent Board of TWA in 1955 with a prescience, wisdom and perfection of timing that exceeds the natural capacity of the most experienced men acting without the benefit of hindsight."

The special master pointed out that no alternative theory of damages was presented by either TWA or the defendants. After discussing in detail the basis for his findings, the special master concluded that TWA had failed to sustain its burden of proof as to damages claimed to have been suffered as the result of the financing program that it was forced to adopt.

As already indicated, proof as to the amount of damages is unfettered by the effect of the default. The resolution of conflicting testimony is a question for the special master and the clearly erroneous rule is applicable.

This objection is overruled.

VI. Losses on Sales of Used Piston Aircraft.

TWA complains that the special master erred in refusing to award any damages for claimed losses on the sale of piston aircraft. It admits that no other area of damages presented quite such complex questions of computation. The amount of damages it seeks under this item is $2.7 million.

TWA takes the position that when jets were introduced into service pistons were made obsolete. Therefore, any delay in delivery of jets must have caused delay in the disposal of pistons. Since the market price of pistons steadily declined during this period, it is claimed that a loss to TWA resulted.

Here again the difference must be recognized between the fact of injury which is admitted and the amount of damages which TWA must show flowed from that injury. The special master found that TWA had failed to sustain its burden of proof on this item of damage and detailed his reasons on pages 272 through 295 of his report. I have reviewed those findings and find that they are supported by the record.

This objection is overruled.

VII. Moratory Interest.

TWA has asked to be awarded moratory, or prejudgment, interest on its recovery. This raises the question whether moratory interest is within my power to grant in an antitrust action for treble damages.

The right to interest on a sum recoverable under a federal statute is determined by federal, not local, law. Rodgers v. United States, 332 U.S. 371, 373, 68 S.Ct. 5, 92 L.Ed. 3 (1947); Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 715, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). Under federal law interest is not available on sums recovered as penalties. Rodgers v. United States, *supra;* United States v. United Drill & Tool Corp., 87 U.S.App.D.C. 236, 183 F.2d 998, 1000 (1950) (dictum). Some cases have ruled that interest is also unavailable on double or treble damage recoveries in certain circumstances. Brooklyn Sav. Bank v. O'Neil, *supra* (Fair Labor Standards Act); United States v. Globe Remodeling Co., 196 F.Supp. 652, 658 (D.Vt. 1961) (False Claims Act).

Relying on *Brooklyn Bank,* Judge Wyzanski denied moratory interest in a treble damage antitrust case. Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F.Supp. 900, 911 (D.Mass. 1954). He cites an unpublished decision by Judge Caffey in this district which reaches the same result. A different result is suggested by the rationale of United Mine Workers v. Coronado Coal Co., 258 F. 829, 846-847 (8th Cir. 1919), rev'd on other grounds, 259 U.S. 344, 42 S.Ct. 570, 66 L.Ed. 975, 27 A.L.R. 762 (1922), but that decision came before *Brooklyn Bank* or *Rodgers.*

Interest should not be allowed in antitrust actions where the statute provides for punitive damages. Treble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his.

This objection is overruled.

Conclusion

The report of the special master awarding damages in the sum of $137,611,435.95 pursuant to 15 U.S.C. § 15 is confirmed.

So ordered.

I.

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UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

No. 61 Civ. 2324.

APRIL 13, 1970.

METZNER, District Judge.

Plaintiff, Trans World Airlines, Inc., moves for the award of reasonable attorney's fees and costs of suit as the successful party in this antitrust litigation. Clayton Act § 4, 15 U.S.C. § 15. Plaintiff requests counsel fees in the sum of $10,500,000 and costs of suit in the sum of $2,230,602.

This court has already awarded damages in the sum of $137,611,435.95. 308 F. Supp. 679 (S.D.N.Y. Dec. 23, 1969).

The general rule is that the fixing of counsel fees in an antitrust action is within the discretion of the trial court, "reasonably exercised." Montague & Co. v. Lowry, 193 U.S. 38, 48, 24 S.Ct. 307, 48 L.Ed. 608 (1904). The problem of how to exercise this discretion reasonably has been the subject of much discussion. Farmington Dowel Prods. Co. v. Forster Mfg. Co., 297 F. Supp. 924 (D. Me. 1969), modified on appeal, 421 F.2d 61 (1st Cir. 1969); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258, 302 (M.D. Pa. 1965), vacated on other grounds, 377 F. 2d 776 (3d Cir. 1967), aff'd in part on other grounds, rev'd in part on other grounds, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); Noerr Motor Freight, Inc. v. Eastern R.R. Pres. Conf., 166 F. Supp. 163, 168 (E.D.Pa. 1958), aff'd 273 F.2d 218 (3d Cir. 1959), rev'd on other grounds,

365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). In *Hanover Shoe, supra,* the court detailed what appear to be the generally accepted factors to be weighed in determining a reasonable attorney's fee. They are:

"(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,

(2) the standing of counsel at the bar—both counsel receiving the award and opposing counsel,

(3) time and labor spent,

(4) magnitude and complexity of the litigation,

(5) responsibility undertaken,

(6) the amount recovered,

(7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,

(8) what it would be reasonable for counsel to charge a victorious plaintiff."

However, these factors are only general guidelines and in the final analysis, "The reasonableness of an attorney's fee can only be determined with reference to a particular case." *Noerr, supra,* at 168.

We have here an unprecedented recovery—some 30 times greater than the next highest recoveries on record. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir. 1961), petition for cert. dismissed per stipulation, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed. 2d 46 (1962), the treble damages were $4,400,000 and in *Hanover Shoe, supra,* at 302, they were $4,239,000. Obviously the fee to be awarded will be unprecedented, but the court will attempt to insulate itself

against the impact of the amount requested in determining what a reasonable attorney's fee should be in this case.

The action was instituted on June 30, 1961. On August 31, 1961 it was assigned to me for all purposes pursuant to rule 2 of the General Rules of this court. The suit was of great magnitude and complexity, and was bitterly contested from its inception. The first phase of the litigation started with defendant Hughes Tool Company conducting deposition proceedings and discovery being made by both parties. Massive sets of interrogatories were served by both parties. The deposition proceedings covered some 80 days of testimony embodied in 13,000 pages of transcript. During this period attempts were made by TWA to serve Howard Hughes so that his deposition might be taken. Toolco engaged in extensive legal maneuverings to forestall the taking of the deposition. Some of those activities are recited in 332 F.2d 602, 611-613 (2d Cir. 1964). Defendant finally moved to dismiss the complaint, which motion was denied, 214 F. Supp. 106 (S.D.N.Y. 1963). The culmination of the maneuvering occurred on February 8, 1963 when counsel for Toolco stated that Hughes would not appear for deposition. He referred to "a business decision" not to proceed further with discovery proceedings, but rather to rest on the merits of the positions theretofore taken and seek judicial review thereof. The Court of Appeals said:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters

in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery." 332 F.2d at 615.

Twenty-one pretrial hearings were held by this court during this phase of the litigation, resulting in the entry of many orders and opinions after hearing argument and reading papers submitted on contested matters.

The first phase ended, as far as this court was concerned, with the striking of Toolco's answer for failure of Hughes to appear for deposition. A judgment by default was directed to be entered in favor of TWA against Toolco and the counterclaims asserted by Toolco against TWA were dismissed with prejudice. 32 F.R.D. 604 (S.D.N.Y. 1963). Separate appeals were taken by Toolco from these two determinations (214 F. Supp. 106 and 32 F.R.D. 604), and the hearing on the amount of damages to be awarded TWA was stayed pending these appeals. The Court of Appeals did not pass upon the propriety of the entry of the default judgment against Toolco with respect to the complaint. It limited its review and affirmance to the holding that the district court had jurisdiction of the treble damage action and that issuance of certain orders by the CAB did not constitute a defense to the action. 332 F.2d 602. At the same time it sustained the dismissal of the counterclaims with prejudice because of Toolco's failure to produce Hughes for examination and its failure to produce certain papers and documents. Id. at 615. It also affirmed the granting of summary judgment to the plaintiff on the sixth counterclaim. Id. at 616. The Supreme Court granted certiorari in both appeals, 379 U.S. 912, 85 S.Ct. 261, 13 L.Ed.2d 184 (1964), and after hearing oral argument on March 3 and 4, 1965, dismissed the writs of certiorari as improvidently granted, 380 U.S. 248, 249, 85 S.Ct. 934, 13 L.Ed.2d 817 (1965).

The second phase of the litigation commenced with the hearings on the damage claims before a special master. Preliminarily, some matters of procedure were disposed of, including an appeal to this court from a ruling of the special master (38 F.R.D. 499 (S.D.N.Y. 1965)), and a motion by the defendant which in effect asked for summary judgment in its favor. This latter motion was denied on January 4, 1966. The special master thereafter directed that on May 2, 1966 plaintiff submit in written form all of the testimony it proposed to offer as its affirmative case. Plaintiff offered eight witnesses who were cross-examined by the defendant for a period of 50 days. The defendant followed the same procedure of submitting the testimony of its witnesses in written narrative form and offered four witnesses who were cross-examined by plaintiff for a total of 35 days. The testimony covered some 11,000 pages of transcript with over 800 exhibits containing 60,000 pages admitted in evidence. Experts of recognized standing in the fields of economics, engineering, finance and accounting were called by both sides. At the conclusion of the hearings before the special master, some 745 pages of briefs were submitted by the parties. The special master then rendered a 323-page report. Cross-motions addressed to the report were submitted to the court with an additional 600 pages of briefs by the parties in support of their respective positions. The court's opinion on these motions was rendered on December 23, 1969. 308 F. Supp. 679.

In this application, counsel of record have stated that they have spent 64,000 hours on this case since they were retained by plaintiff. I have excluded some 4,000 hours that are credited to persons who worked on the case but who were not members of the bar in the year that the services were rendered. One of these persons is credited with 3300 hours over a three-year period. An additional 1400 hours have been excluded, since they are not within the period for which compensation should be considered. I have also made an adjustment of hours depending on whether, at the

time the services were rendered, the person involved was a partner or associate. The result is that the firm is credited with 58,600 hours, of which 20,000 hours are allocable to partners' time and 38,600 hours allocable to associates' time. These hours were all attributable to the problems of this litigation.

One of the factors to be considered in determining a reasonable fee is whether the plaintiff had the benefit of a prior government judgment or decree. Defendant contends that the default judgment in this case gave plaintiff even greater assistance than a prior government judgment would have offered. This is an oversimplification of the problem. The default occurred only after several years of intensive litigation with appeals by defendant all the way up to the Supreme Court. If there had been a prior judgment which would have the prima facie effect afforded by § 5(a) of the Clayton Act, 15 U.S.C. § 16(a), this effort might well have been unnecessary.

Despite the default the issue as to the amount of damages was severely contested. There still remained for disposition intricate and complex issues and proof on the question of damages, which are amply reflected in the report of the special master. In addition defendant relitigated the effect of the default and the scope of judicial notice, which had previously been disposed of (38 F.R.D. 499). The length and scope of the damage hearings belie defendant's argument that "So far as that was concerned [absence of a prior judgment] their job was a cinch. The default * * * left only arithmetic to be done by plaintiff's counsel." For example, an expert offered by defendant was cross-examined for 22 days on the basis of a 656-page report which he had used in putting together his direct written testimony. Subsequently this witness made corrections in his direct testimony which produced 13 volumes of computer printouts. A supplemental report was then filed by defendant for this witness which contained 230 additional

pages with more computer printouts and work papers. All of this had to be analyzed and met by plaintiff's expert witness in this one field of inquiry.

We come now to the question whether compensation may be granted for time spent in this lawsuit on matters unconnected with the award of damages. § 4 of the Clayton Act provides that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

Defendant contends that time spent by plaintiff's counsel in seeking to obtain equitable relief may not be considered in determining the amount to be awarded as counsel fee. This is true since the allowance of attorney's fees is incidental to the statutory right to damages. Decorative Stone Co. v. Building Trades Council, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594, 48 S.Ct. 530, 72 L.Ed. 1005 (1928) (request for an award of counsel fee rejected where only injunctive relief was sought); Ring v. Spina, 84 F. Supp. 403, 408 (S.D.N.Y. 1949), modified sub nom. Ring v. Authors' League of America, Inc., 186 F.2d 637 (2d Cir.), cert. denied, 341 U.S. 935, 71 S.Ct. 854, 95 L.Ed. 1363 (1951), and Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 899 (S.D.N.Y. 1948) (request rejected where damages and injunction were sought, but plaintiff successful in obtaining only an injunction). In this case, however, the development of the facts was the same for both grounds of claimed relief, and the hours eliminated would merely be those devoted to spelling out the claim for an injunction and applying therefor to the court. Such time would be minimal in the overall picture, but will be taken into account in fixing the fee.

Defendant also contends that the time spent in defending against the counterclaims may not be considered on this application. Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476, 489 (E.D. Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966). This is certainly true as to the sixth counterclaim on which summary judgment was awarded plaintiff. But here again the amount of time involved on this issue is minimal. As to the other five counterclaims, they were inextricably bound up with the claims of plaintiff. Defendant itself stated that "In effect the facts asserted in the counterclaims constitute affirmative defenses to the allegations of the complaint." These affirmative defenses had to be overcome for plaintiff to succeed on its claim for damages and thus should be considered in making the fee award.

Defendant argues that the award of counsel fee should be limited to the time and effort necessary to prove items of damage sustained and may not include an award for time spent on claimed items of damage which were rejected by the trier of the facts. Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490 (D. Mass. 1963), vacated on other grounds sub nom. Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798, 801 n. 2, motion to recall mandate denied, 333 F.2d 808 (1st Cir.), cert. denied, 379 U.S. 931, 85 S.Ct. 329, 13 L.Ed.2d 343 (1964); *Bergjans Farm Dairy Co., supra;* Osborn v. Sinclair Ref. Co., 207 F. Supp. 856, 864 (D. Md. 1962), rev'd on other grounds, 324 F.2d 566 (4th Cir. 1963). These decisions are refinements of the rule set forth in the *Decorative Stone, Ring* and *Alden-Rochelle* cases, *supra.* However, the courts in applying this limitation pointed out that they were concerned with cases where the recovery was small in relation to an asserted large claim. It is interesting to note that in *Union Leader* single damages were $29,442 with an award of counsel fee of $60,000 and in *Osborn* single damages were $325 with an award of $14,000. See also Darden v. Besser, 257 F.2d 285 (6th Cir.

1958), where single damages were $15,000 with an award of $30,000.

In the instant case the award, to say the least, is substantial. The failure of the plaintiff to achieve a recovery of $510,000,000 was not due so much to the failure to prove items of damage as it was to the rejection of its theory of measuring damages. There was a reasonable basis for urging the comparative profits theory (Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946)) even though the court ultimately ruled against plaintiff on this theory.

Consequently, while reassessment must be made of the time and labor spent by plaintiff in these areas of work, this does not require extensive adjustments in the time factor. The court has been closely involved with this case since August 31, 1961 and is in a position to make a proper evaluation without further proof being called for. This is all the more true since, as indicated below, the time factor is not that crucial in a case such as this.

The firms of Cahill, Gordon, Sonnett, Reindel & Ohl, representing the plaintiff, and Donovan, Leisure, Newton & Irvine and Chester C. Davis, representing the defendants, are recognized as able and experienced counsel. In fact, the Donovan, Leisure firm was counsel for the successful plaintiff in the *Hanover Shoe* case, *supra*. The history of the proceedings attests to the great responsibility undertaken by counsel.

Defendant points out that plaintiff's application claiming 64,000 hours of time spent on this litigation amounts to a request for $164 an hour for all of the services rendered, whether by senior partners, junior partners, senior associates or junior associates. It then refers to computations made by it of awards in other cases, translated into

terms of hourly rates. The requested fee, if it is to be based on a "mix" rate of $164 an hour, could be excessive even in the City of New York. I would estimate that a "mix" rate of $75 an hour would be charged by outstanding, experienced law firms in this city. However, attributing substantial weight to an hourly rate is unfair in a case such as this where success and complexity of issues are such important factors. In *Hanover Shoe, supra,* where the treble damages of $4,239,000 were about the highest heretofore obtained, the court pointed out that it arrived at the fee award of $650,000 on bases other than hours spent by counsel. Consequently, the computation of hourly rates in that case had little meaning.

Similarly, a fee based on a percentage of recovery is not a satisfactory test for this case, although it appears to have been the sole one used in the *Union Carbide* case, *supra,* where the court held that "an allowance of 15 percent of the amount recovered * * * would be reasonable." 300 F.2d at 587. A percentage fee gives undue weight to the size of the recovery. In cases with small recoveries, it completely ignores professional skill and the complexity of the work involved, and could result in an insufficient award for services rendered. See *Union Leader, supra,* 218 F. Supp. at 493; *Noerr, supra,* 166 F. Supp. at 170. Conversely, where the recovery is extraordinarily high, it could result in an excessive award.

Finally, we come to the eighth factor, which has been framed by two judges as the ultimate test to be applied: that is, a fee which in the judgment of the trial court "would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer." Cape Cod Food Prods., Inc. v. National Cranberry Ass'n, 119 F. Supp. 242, 244 (D. Mass. 1954); *Farmington Dowel, supra,* 297 F. Supp. at 926. On the other hand, this test has been characterized as the outer limits of recovery. *Noerr, supra,* 166 F. Supp. at 170.

It seems to me that the major factors bearing on the fixing of attorneys' fees in antitrust cases are the complexity of the problems presented, the skill of counsel, and the measure of success achieved by counsel. The other factors are subsidiary to these and may be helpful in evaluating them, but neither separately nor collectively do these other factors constitute the basis for fixing the fee.

In measuring the success of counsel, only single damages should be considered, since that is the amount produced through the efforts of counsel. Trebling is a penalty imposed by law and automatically attaches to the damages found. Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846, 859 (8th Cir.), cert. denied, 343 U.S. 942, 72 S.Ct. 1035, 96 L.Ed. 1348 (1952); Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 571 (7th Cir. 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680 (1952). Consequently, the referable recovery here is $45,870,478.

As stated at the outset, the problem of how to reasonably exercise the court's discretion is a difficult one and in the final analysis it can only be resolved with reference to a particular case. A point is reached where the amount of plaintiff's recovery is unrelated to services of counsel. The large amounts involved do not add to the complexity of the problems, increase the responsibilities of counsel or require greater capabilities of counsel.

After carefully reviewing the entire matter and giving effect to the adjustments discussed above, it is my considered judgment that a reasonable attorney's fee in this case is $7,500,000.

Plaintiff requests $2,230,602 as "the cost of suit" allowable by § 4 of the Clayton Act. It concedes that, aside from attorney's fees, no case has ever gone beyond "taxable costs" which are awarded in any case to a successful party. 28 U.S.C. § 1920; Fed.R.Civ.P. 54(d). Similar requests by successful plaintiffs in private antitrust suits to be awarded their "reasonably incurred expenses of liti-

gation" have been uniformly rejected. *Farmington Dowel, supra,* 297 F. Supp. at 930. This request is accordingly denied.

Alternatively, plaintiff requests $396,596.43 as taxable costs. Included in this sum is $28,342.63 claimed for services in connection with attempts to serve Hughes. These charges are based on payments to lawyers and private investigators in several parts of this country and Mexico City. To the extent that these payments are allocable to attempts to serve a summons on Hughes as a defendant in this action, they clearly are not taxable costs against Toolco. They also are not taxable for that portion of the services involved in attempting to serve a witness subpoena on Hughes. § 1920 provides for taxation of fees of witnesses, not the expense of searching out the witness. On the record it is clear that Hughes and Toolco were one and the same, and therefore service of notice to take deposition would have sufficed for plaintiff's purposes. Consequently, this item is disallowed.

The sum of $19,145.20 for printing costs in the Court of Appeals and the Supreme Court is not taxable, nor are the costs applicable to printing more than 50 copies of the other documents.

As to the transcript of damage hearings, plaintiff may only tax its share of the cost of transcript furnished to the special master plus three additional copies.

Finally, plaintiff has again requested moratory interest to run from the date of the report of the special master. I rejected this plea in my opinion disposing of the motions addressed to the report of the special master. I see no reason to change that disposition in which I said:

> "Interest should not be allowed in antitrust actions where the statute provides for punitive damages. Treble damages compensate a plaintiff handsomely for all his losses, including loss of the use of money rightfully his." 308 F. Supp. at 696.

Judgment shall be entered accordingly. So ordered.

J.

Judgment Entered April 14, 1970

[Doc. 531]

61 Civ. 2324

[CAPTION]

This action came on for hearing before the Court, the Honorable Charles M. Metzner, District Judge, presiding, and the issues having been duly heard, and the Court having rendered its decisions of December 23, 1969 and April 13, 1970, and having directed the entry of judgment thereon,

It is hereby Ordered and Adjudged

That the plaintiff Trans World Airlines, Inc. recover of the defendants Hughes Tool Company and Raymond M. Holliday, jointly and severally, the sums of $137,611,435.95 as damages, $7,500,000.00 as a reasonable attorneys' fee, and $336,705.12 as costs, for a total amount of $145,448,141.07, together with interest thereon at the rate of 6% as provided by law.

Dated at New York, New York, this 14th day of April, 1970.

CHARLES M. METZNER
U.S.D.J.
JOHN LIVINGSTON
Clerk of the Court

Judgment Entered 4/14/70

K.

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UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

TRANS WORLD AIRLINES, INC., *Plaintiff*,

v.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

No. 61 Civ. 2324.

June 10, 1970.

METZNER, District Judge.

Defendants move for a stay of execution, pending appeal, of the judgment entered in favor of the plaintiff without posting the usual supersedeas bond. Practically speaking, defendant Hughes Tool Company (hereinafter called Toolco) is the party involved in this motion.

F.R.C.P. 62(d) provides that "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule.* * *" Rule 33 of the General Rules of this court provides that such bond shall be in the amount of the judgment plus 11% and an additional $250 to cover costs. Plaintiff in this antitrust action was awarded single damages of $45,870,478.65, which after trebling and adding costs and a reasonable attorney's fee amounts to $145,448,141.07. The bond would have to be in the amount of $161,447,686.59.

Rule 31(b) of the General Rules of this court provides that every bond or undertaking must either:

"(1) be secured by the deposit of cash or government bonds in the amount of the bond, undertaking or

stipulation, or be secured by (2) the undertaking or guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury * * *."

The third alternative provided by the rule is not applicable to this case.

It is Toolco's contention that either of the alternatives contained in Rule 31(b) "could not be effected without imposing an added penalty on [Toolco] by requiring it to engage in disruptive and time-consuming liquidation of assets or a costly and time-consuming financing program." It proposes that it either not be required to post any bond or undertaking, or that whenever the net worth of Toolco goes below three times the judgment the stay pending appeal shall be lifted.

Although the final judgment in this matter was not entered until April 14, 1970, the report of the special master recommending damages in the amount of $137,611,-436.95 was confirmed by this court on December 23, 1969. Defendants apparently did nothing from that time until May 5, 1970 (the date of the order to show cause bringing on this motion) to arrange for the posting of the required bond except to make inquiry of surety companies. Appended to the order to show cause are two letters from surety companies indicating that a bond of this size could be arranged only if secured with a deposit of collateral in the form of cash or government bonds or documents of similar liquidity in the full amount of the bond. The inability of surety companies to undertake such an obligation is fully understood and appreciated by the court.

Because of the unprecedented size of the judgment against what is in essence a single defendant, the court signed the order to show cause in an attempt to see if some satisfactory arrangement could be worked out whereby the interests of the successful plaintiff could be reconciled with

the understandable, practical problems facing Toolco. Hearings were held on May 11, May 20 and June 3 which were unproductive in bringing the parties close to a solution of the problem.

At the outset the brief submitted by Toolco took the position that the law was clear to the effect that the court has the power "in extraordinary circumstances such as those presented by this case, to grant a stay of execution without requiring the filing of a supersedeas bond in the ordinary form or the posting of any security." It argued that its net worth was in excess of $500,000,000 and that this was ample assurance that the plaintiff would be able, in the event of affirmance, to obtain satisfaction of its judgment without the posting of any security at the present time. In addition, it offered that a lien could be created on specific property having a value in excess of $45,000,000, the amount of the compensatory portion of the judgment. The plaintiff took the position that Rule 33, requiring a bond in the amount of 111% of the judgment, indicates that any lower figure is most unlikely to be sufficient security for the payment of a judgment.

With the adoption of the Federal Rules of Appellate Procedure, effective July 1, 1968, Rule 73(d) of the Federal Rules of Civil Procedure, which referred to supersedeas bonds on appeals to the Court of Appeals, was repealed. It had provided, among other things, that:

> "the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on appeal, interest, and damages for delay, unless the court, after notice and hearing and for good cause shown, fixes a different amount • • • ."

These words had been inserted in the original rule in 1938 to cover situations where money judgments of enormous

sums had been entered and defendants were unable to give a supersedeas bond to stay the execution of a judgment. The language allowed the court, in a case of hardship of that kind, to issue a stay of execution so that, in effect, the defendant's right of appeal would not be destroyed. The language was not transferred to any other section of the rules by the amendment of 1968, and consequently the court is faced with F.R.C.P. 62(d) and our local district Rule 33. Despite the repeal of Rule 73(d), I am of the opinion that the court has the inherent power in extraordinary circumstances to provide for the form and amount of security for a stay pending appeal, based on the conditions it finds to exist in a particular case. See 9 Moore, Federal Practice ¶ 208.06[1] at 1416 (2d ed. 1969).

At the first hearing on May 11, the parties adhered to their diametrically opposed positions. The plaintiff pointed out that there was no assurance that Toolco's present net worth would continue to exist. It further took the position that during the period from December to May Toolco, with its asserted net worth, could have arranged for a loan to be used as an undertaking. Plaintiff suggested that Howard Hughes, the sole owner of the stock of Toolco, should guarantee the payment of the judgment and place his stock with the court as collateral for such guaranty.

If consideration was to be given to Toolco's proposal, plaintiff asserted that it should receive the same treatment as would be afforded any lending institution approached for a loan by Toolco. This would include certified, detailed financial statements, regular certificates by responsible officers of defendants as to the maintenance of net worth and limitations on transactions between Toolco and its 100% stockholder. However, plaintiff adhered to its view that Toolco should arrange for financing in order to secure the judgment in full.

The hearing was adjourned to May 20 with a direction to the defendants to conduct negotiations with lending in-

stitutions. Counsel were admonished to have continuing discussions so that on the adjourned date the plaintiff would not be faced with a new proposal for the first time.

The fear of the court was well founded since it appears that Toolco's new proposal was sent to plaintiff's counsel the day before the adjourned hearing. That proposal contained four provisos:

> "1. HTCo [Toolco] will furnish TWA with a Certificate by its Treasurer certifying that the present net worth of the Company, determined in accordance with generally accepted accounting principles applied on a basis consistent with prior accounting periods, without provison for the judgment, is in excess of $500 million, namely, substantially in excess of three times the amount of the judgment.
>
> "2. Thereafter, HTCo will provide TWA quarterly, or more frequently if desired, with a Certificate of its Treasurer certifying that the net worth of HTCo remains substantially in excess of three times the amount of the judgment.
>
> "3. Haskins & Sells advises that they will have completed their audit for the year ended December 31, 1969 by the end of the month. HTCo will immediately engage Haskins & Sells to make quarterly audits. Shortly after such engagement Haskins & Sells will be able to complete interim audit procedures for the first quarter of 1970.
>
> "4. HTCo will provide TWA with an appropriate Certificate of Haskins & Sells based upon such audits which will support the Treasurer's Certificate and, in addition, based upon interim auditing procedures Haskins & Sells will provide TWA from time to time with a confirmation in the form of a 'comfort letter', customarily furnished to underwriters, to the effect that

nothing has come to their attention subsequent to their last audit to indicate that the net worth of the Company has been reduced to an amount which is not in excess of three times the amount of the judgment."

The letter ended with the following statement: "Based on our telephone conversation, I expect to hear from you to arrange a meeting for this afternoon to discuss the matter further." On the same date plaintiff submitted a nine-page proposal as to what it was willing to accept.

The hearing proceeded on May 20, in which counsel for Toolco outlined the discussions had with the banks. The following statement by counsel appears on page 16 of the transcript:

"So you reduce all that and you say: What does that mean in terms of how much you can do?

"And they say: Well, we don't know exactly yet but we would be happy to do it.

"What will it cost?

"Well, we cannot exactly tell you what terms and conditions.

"But you put all those together and the only conclusion you come to is that it is not realistic * * *."

The interesting point about all this is that Toolco never requested the banks to follow through and come up with definitive answers. It took the position that whatever the cost, it would be unduly burdensome. If Toolco had wanted financing to conclude a business transaction, I am sure that there would have been no hesitancy on its part to get the concrete answers, but somehow it did not take that tack to solve this problem. The hearing was adjourned to June 3 with a direction to Toolco to furnish the plaintiff with the audited financial statements of its operations for

the year 1969 and a list of its assets worth $10,000,000 or more. This was done for the purpose of giving the plaintiff an opportunity to know what was being offered and to be in a position to evaluate whether it would be sufficient to secure its judgment.

Aside from charges and countercharges of bad faith, a large portion of the hearing on June 3 was devoted to a statement by defense counsel as to the huge capital demands being made on Toolco by its subsidiaries and affiliates. The sum total of all this was that there could be nothing available for the plaintiff by way of cash security. Business was to continue as usual with Toolco being the sole arbiter of what it wanted to do. Cash could be converted to fixed assets which would not affect the net worth of the company as reflected on a balance sheet. However, it could certainly affect what I would call the quality of that net worth insofar as the collection of the judgment is concerned. We read every day about the liquidity squeeze.

The figures which were furnished the plaintiff indicate that in the three-month period ending March 31, 1970 the quick current assets have been reduced by a third. In addition, the court received a letter from Toolco's counsel dated May 22, 1970 stating that the court should not be surprised to read an announcement in the press, either late that day or the next day, that Toolco had acquired the Dunes Hotel for a cash consideration of $35,000,000 and that there was a contemplated transaction in which Toolco would be called upon to lay out another $11,000,000 within the next six or eight months. There are additional examples of cash commitments in the financial notes to which I need not specifically refer.

Part of business as usual must include some recognition of the rights of this plaintiff that has acquired a judgment against Toolco for violation of the antitrust laws of the United States. Toolco requests plaintiff to forgo both

immediate collection of its judgment and full security for that judgment pending appeal. It must be prepared to assume some financial burden to achieve "business as usual." At the same time, I fully appreciate that under present conditions a supersedeas bond in the amount contemplated by Rule 33 is not practicable under the circumstances. I have come to the conclusion that Toolco can arrange to post security in the form required by Rule 31(b) in the amount of $75,000,000. This shall be done on or before June 22, 1970. The balance of $86,447,686.59 shall be secured along the lines suggested by the defendants as to the maintenance of Toolco's net worth at three times the amount of such balance. The details of this arrangement shall be worked out between counsel. Each knows what the other has proposed. The court cannot be expected, on the papers before it, to come up with a satisfactory resolution embodying such detailed and intricate financial considerations. It should not be required to devote the time necessary to preside over such a conference between counsel. Obviously, there has to be flexibility on both sides for this endeavor to be successful.

Counsel are directed to meet in continuous session and appear before the court on June 16 in Room 1106 at 10:30 A.M. with a proposal in such form that any needed resolution of disputes can easily be disposed of.

So ordered.

L.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC., *Plaintiff*,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants*.

Order

Defendants Hughes Tool Company ("HTCo") and Raymond M. Holliday having moved by order to show cause dated May 5, 1970 for an order granting a stay, pending appeal, of execution of the judgment in favor of the plaintiff Trans World Airlines, Inc. ("TWA") entered herein on April 14, 1970, and that motion having come on for hearing before the Court on May 11, May 20 and June 3 and the Court having rendered an opinion on June 10, 1970, it is

ORDERED that the execution of, and any proceedings to enforce, the judgment in favor of TWA entered herein on April 14, 1970, be stayed pending the determination by the United States Court of Appeals for the Second Circuit of defendants' appeal from such judgment, provided, however,

(1) That HTCo on or before June 22, 1970 file with the Court a supersedeas bond in an amount not less than $75,000,000 to be secured in the aggregate in the manner provided by Rule 31(b) of the General Rules of this Court; it being understood that in lieu of depositing cash or government bonds (including obligations guaranteed by the government) pursuant to the provision of Rule 31(b)(1) HTCo may deposit certifi-

cates of deposit and short-term commercial paper, with the right from time to time to substitute for such securities other similar securities so long as the total principal amount of securities is no less than $75,000,000 or to substitute in whole or in part for such deposit of securities an undertaking or guaranty under Rule 31(b)(2), it being further understood that the surety or sureties on such undertaking or guaranty shall remain liable in the amount of the undertaking or guaranty until all amounts finally determined to be due following appeal or expiration of time for appeal have been paid, and it being further understood that TWA shall take no steps to recover any such security or to enforce any such undertaking or guaranty until the expiration of a period of not in excess of 90 days following the final disposition of the appeal; and

(2) That HTCo maintains a net worth (stockholder's equity) in excess of $335,000,000.

It Is Further Ordered that the stay of execution herein provided shall terminate if at any time the net worth of HTCo should fall below $335,000,000.

It Is Further Ordered that so long as the stay of execution provided herein remains in effect HTCo shall furnish to TWA

(1) An audited balance sheet, on a quarterly basis, of HTCo and its subsidiaries, commencing with the balance sheet for quarter ending June 30, 1970, consolidated on an equity basis, in the form previously furnished to TWA for the year ended December 31, 1969, together with a certification by Haskins & Sells that such quarterly balance sheets were prepared in conformity with generally accepted accounting principles on a basis consistent with prior years and that such balance sheets reflect that the net worth (stock-

holder's equity) of HTCo, without provision for the judgment herein, is in an amount in excess of $335,000,000. HTCo will also furnish TWA with a schedule of the principal assets reflected on the balance sheet identifying each of the fixed assets of HTCo, including the location thereof, having a book value in excess of $5,000,000 and setting forth with respect to each such asset its book value and the nature and amount of any material existing liens or encumbrances thereon, and setting forth such additional information, if any, as shall be required to permit reconciliation thereof with the last preceding, similar schedule of principal assets filed pursuant to this order. The quarterly audited balance sheets and certifications thereof by Haskins & Sells and schedules of assets shall be furnished to TWA no later than 120 days following the close of each quarter.

(2) A certificate by the Treasurer of HTCo, on a quarterly basis, commencing with the quarter ending June 30, 1970, certifying that the net worth (stockholder's equity) of HTCo as of the date of the certificate, determined in accordance with generally accepted accounting principles applied on a basis consistent with prior accounting periods, without provision for the judgment herein, is an amount in excess of $335,000,000. At the same time that HTCo furnishes TWA with its Treasurer's certificate, HTCo will also furnish TWA with a letter from Haskins & Sells to the effect that since the last audit by Haskins & Sells and to the date of such letter nothing has come to their attention to indicate that the net worth (stockholder's equity) of HTCo is in an amount which does not exceed $335,000,000. Said certificates by the Treasurer of HTCo and said letters by Haskins & Sells will be furnished to TWA no later than 30 days following the close of each quarter.

IT IS FURTHER ORDERED that so long as the stay of execution herein provided remains in effect HTCo shall not make any distribution or transfer of its assets which would reduce its net worth below $335,000,000.

IT IS FURTHER ORDERED that the HTCo balance sheets and the schedule of assets heretofore supplied to plaintiff and all documents which HTCo may hereafter furnish to TWA pursuant to this order (the "HTCo Documents") shall be given confidential treatment in strict accordance with the conditions stated below provided that defendants shall have stamped thereon at the time of delivery to TWA a legend reading substantially as follows: "CONFIDENTIAL This document may be examined only by authorized persons and in accordance with the order of the U. S. District Court, S.D. N.Y., dated June 16, 1970."

(1) No HTCo Document may be used by or on behalf of TWA except to determine compliance by HTCo with the terms of this order or in connection with further proceedings related to such compliance and the continuance or termination of the stay of execution herein granted, provided that TWA shall not be barred from using information relating to the existence and location of HTCo assets contained in any HTCo Document in aid of proceedings to enforce the judgment herein should the stay of execution be terminated.

(2) No HTCo Document shall be reproduced or copied by TWA or its attorneys or anyone acting on their behalf. If the attorneys for TWA require additional copies, such copies shall be obtained from counsel for HTCo.

(3) No HTCo Document shall be voluntarily disclosed by attorneys for TWA to any person other than (a) members of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl and its employees; (b) the following named members of Price, Waterhouse & Co., inde-

pendent public accountants: John C. Biegler, Donald H. Trautlein, Dean H. Secord and Robert E. Roth, or such member of Price, Waterhouse as counsel for TWA may hereafter designate in their stead by letter to the Court and to HTCo; (c) the following named officers or directors of TWA: Charles C. Tillinghast, Jr., Chairman of the Board of Directors, Barry T. Leithead, Chairman of the Litigation Committee of the Board of Directors, L. Edwin Smart, Senior Vice President-External Affairs and Raymond R. Fletcher, Jr., Esq., Vice President and General Counsel, or such director or officer as may succeed to their positions, and be designated in their stead by counsel for TWA by letter to the Court and to HTCo, provided, however, that any such disclosures shall be made only to persons actively concerned with or engaged in the handling of proceedings relating to the stay of execution on a "need-to-know" basis, and shall be as limited as reasonably may be possible, and except that disclosures may be made to a court having jurisdiction of this action in connection with proceedings relating to the stay of execution of the judgment herein.

(4) When not in such use as is permitted by the provisions of this order, attorneys for TWA shall keep the HTCo Documents in a locked filing cabinet and shall give access thereto only in conformity with the provisions of this order.

(5) All HTCo Documents which are delivered to this Court shall be maintained in a sealed file in the custody of this Court or its Clerk, and no such HTCo Document shall be made available to any person other than counsel of record in this action.

(6) Upon the termination of the stay of execution granted by this order, all HTCo Documents shall be promptly returned to HTCo.

(7) This order shall be binding upon each and every person who at any time has possession of or access to any HTCo Document, and no such person shall disclose any of the contents of any such document to any person not covered by the terms and intent of this order. The attorneys for TWA shall cause a copy of this order to be shown to each person to whom any HTCo Document is disclosed by them, and shall maintain a list of the names and addresses of all such persons, which list shall be made available to HTCo for inspection by it upon request.

Dated: New York, New York
June 16, 1970

/s/ CHARLES METZNER
U.S.D.J.

The entry of the above order is consented to:

/s/ DUDLEY B. TENNEY
Counsel for Plaintiff TWA

/s/ JAMES V. HAYES
Counsel for Defendants
Hughes Tool Co. &
Raymond M. Holliday

M.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 883, 834—September Term, 1970.

(Argued May 7, 1971 Decided September 1, 1971.)

Docket Nos. 34902, 35114

TRANS WORLD AIRLINES, INC.,
Plaintiff-Appellant,

v.

HOWARD R. HUGHES,
Defendant,

and

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

Before:

SMITH, KAUFMAN, and HAYS,
Circuit Judges.

Cross-appeals from a final judgment for plaintiff in the amount of $145,448,141.07, upon a previous default judgment entered on a complaint alleging violations of the antitrust laws, by the United States District Court for the Southern District of New York, Charles M. Metzner, *Judge*, following a hearing on damages before Special Master Herbert Brownell.

Modified with respect to interest on the judgment and as modified, affirmed.

JAMES V. HAYES (Ralstone R. Irvine, Mahlon F. Perkins, Jr., David A. Wier, *of counsel*; Donovan, Leisure, Newton & Irvine, New York, N. Y.; Davis & Cox, New York, N. Y., *on the brief*), *for defendants-appellants.*

DUDLEY B. TENNEY (Paul W. Williams, Immanuel Kohn, Marshall H. Cox, Jr., Abraham P. Ordover, Lawrence C. Browne, Michael P. Tierney, *of counsel;* Cahill, Gordon, Sonnett, Reindel & Ohl, New York, N. Y., *on the brief*), *for plaintiff-appellant.*

KAUFMAN, *Circuit Judge:*

We are presented in this case with cross-appeals from a final judgment entered April 14, 1970, premised upon a previous default judgment, in favor of plaintiff Trans World Airlines. Inc. (TWA) against defendants-appellants Hughes Tool Company and its chief financial officer, Raymond M. Holliday (Toolco), which, the district court tells us, 312 F. Supp. at 480, is some thirty times greater than the next highest monetary award ever entered.

The extraordinary aspect of this complex litigation is in large measure attributable to the elusiveness of Howard R. Hughes, progenitor and sole owner of Toolco, protagonist in its operations, in a sense the central character of this litigation as well, and yet not a party to this appeal because Hughes himself, although named as a defendant in TWA's complaint, could not be located for service of process.

I.

Since the facts in this litigation have been set forth in detail in many prior reported decisions, *see* 214 F. Supp. 106 (S.D.N.Y. 1963), 32 F.R.D. 604 (S.D.N.Y. 1963); 332 F.2d 602 (2d Cir. 1964); 38 F.R.D. 499 (S.D.N.Y. 1965); 308 F. Supp. 679 (S.D.N.Y. 1969); 312 F. Supp. 478 (S.D.N.Y. 1970), in the interest of avoiding unconscionable length of this opinion, we will limit our own initial statement to a brief resumé of the tortuous history of the case, sufficient to permit a meaningful statement of the issues raised.

More than a decade ago, by a complaint dated June 30, 1961, TWA filed its complaint in this action charging Toolco and Hughes with violations of the Clayton and Sherman Acts, 15 U.S.C. §§ 1, 2, 11, and 18, as well as with a claim, for which pendent jurisdiction was asserted, alleging malicious and willful injury to the business of TWA.

Convoluted and protracted pre-trial maneuvers culminated in the failure of Toolco to produce Hughes for a deposition scheduled by court order to be taken on February 11, 1963. As a result of Hughes' confessed unwillingness to appear, as well as the nonproduction by Toolco of certain papers and documents whose disclosure to plaintiff had also been required by court order, the Rule 2 judge assigned to the action (Rule 2, *General Rules for the Southern and Eastern Districts of New York*), Judge Metzner, on May 3, 1963 filed two orders. One entered the default against Toolco and granted TWA's motion to increase the *ad damnum* clause of its complaint from $105,000,000 to $135,000,000, after trebling. In the second order Judge Metzner also found Toolco in default with respect to five counterclaims that Toolco had asserted against TWA and several additional defendants. Judge Metzner dismissed these counterclaims and also granted TWA's motion for summary judgment on a sixth counterclaim.

We granted leave to take an interlocutory appeal from the former order, after Judge Metzner had certified that an appeal was appropriate under 28 U.S.C. § 1292(b). But we limited our review to considering whether the district court's jurisdiction over the antitrust action was ousted because primary jurisdiction lay with the Civil Aeronautics Board, which had approved various steps by which Toolco gradually assumed virtually complete control of TWA, holding about 78% of its stock at the time the complaint was filed, and whether certain of the CAB orders associated with those grants of approval constituted a good

defense to TWA's action. The interlocutory appeal was consolidated with defendants' parallel appeal as of right from Judge Metzner's dismissal of the counterclaims. A panel of this court ultimately ruled that the district court did properly assert its jurisdiction and that the CAB orders did not constitute blanket approval of the claims in the complaint and hence were not a defense to TWA's action. In the appeal on the counterclaims, the orders of the district court were affirmed with one exception, not relevant here (determining that the CAB had exclusive jurisdiction over one of the dismissed counterclaims). 332 F. 2d 602, *cert. granted,* 379 U.S. 92 (1964), *cert. dismissed as improvidently granted,* 380 U.S. 248, 249 (1965).

Judge Metzner's ruling adjudging Toolco in default necessitated an extensive hearing to determine damages. Herbert Brownell, Esq.,[1] appointed Special Master for this purpose, conducted hearings between May 2, 1966 and April 9, 1968. On September 1, 1968, in a thorough report, the Master awarded TWA trebled damages of $137,611,435.95. Both sides filed objections. On December 23, 1969, Judge Metzner adopted Brownell's report in all respects, 308 F. Supp. 679, and then in a subsequent opinion awarded attorneys fees of $7.5 million and assessed costs in the amount of $336,705.12. 312 F. Supp. 478. On April 14, 1970, the district court entered its final judgment, with 6% interest to run from that date, in the sum—impressive even by space age and inflationary standards—of $145,448,141.07.[2]

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[1] Hon. J. Lee Rankin, appointed Special Master during pre-trial proceedings, was replaced when he resigned in December 1965 to become Corporation Counsel for New York City.

[2] A prayer for equitable relief included in the original complaint was mooted when Toolco sold all its TWA stock in May, 1966.

II.

A. *Toolco Appeal*

The first thrust of the Toolco appeal is directed at the default judgment itself and primarily concerns issues that were not the focus of the damage hearing before Special Master Brownell. The broad question pressed by Toolco is whether TWA is entitled to recover any amount whatever on the record before us, regardless of the adequacy of its proof of damages. Toolco contends (discussed in part III below) that the default judgment was improperly entered against it, in violation of its due process rights, and should be vacated; that (part IV) even if the default judgment is valid, the judgment does not justify assessing damages against Toolco for any antitrust violations, since in Toolco's view the evidence in the record conclusively refutes the possibility that any such violations could have occurred; and that (part V) even if the default judgment establishes antitrust infractions, TWA has not proved that any damages it might have suffered as a result of acts of mismanagement alleged in the complaint arose from antitrust violations. On each of these questions, we affirm the judgment below in all respects.

Toolco also contests Special Master Brownell's calculations of the damages. It argues that (part VI), even if proximate causation was shown, the damages were in several respects wrongly computed. In each of these respects we also affirm the reasoning and conclusions of the Master and of Judge Metzner.

Additionally, Toolco challenges under F.R. Civ. P. 54(c) Judge Metzner's grant of TWA's motion to increase the *ad damnum* at the same time he entered the default judgment (part VIII). It also argues that the award of attorney's fees is excessive and unreasonable (part IX). We believe Judge Metzner properly permitted TWA to raise the *ad damnum* and that the payment allowed for legal services was within the bounds of his discretion.

B. *TWA Appeal*

TWA takes issue with only one item of Brownell's report, *viz.* certain interest charges credited in mitigation of damages (part X). We affirm the Master's disposition of this issue. TWA also appeals from the denial by Judge Metzner of moratory interest as an element of the damages to be trebled under Section 4 of the Clayton Act, 15 U.S.C. § 15. It also questions Judge Metzner's holding that interest on the judgment should run from the date of the district court's judgment, rather than the date the Special Master filed his report, and contests the award of only 6% interest pursuant to New York judgments law, intead of the 7½% currently set by the state Banking Board as the maximum allowable commercial rate. We discuss these issues in part XI and affirm the district court on the first two points but hold that proper interest under current New York decisional authority is 7½%. TWA's last assertion (part XII) is that it may recover $1.6 million compensation for fees paid to experts as a component of its "cost of suit," 15 U.S.C. § 15. With this assertion we disagree.

III.

Toolco argues forcefully that Judge Metzner's entry of a default judgment having such drastic consequences resulted in a denial of due process and was otherwise an abuse of discretion under F. R. Civ. P. 37(b)(2)(iii) and 37(d). We are reminded not only of the severe nature of this particular default but of the fundamental importance of the right to an adversary hearing prior to judicial determination of rights and liabilities. We are in full accord with the general proposition, for which Toolco cites the three leading cases of *Hovey* v. *Elliott,* 167 U.S. 409 (1897), *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322 (1909), and *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958), that the totality of circumstances surrounding the

failure to make discovery must be considered in determining what sanctions to apply under Rule 37. As we understand Toolco's argument, those portions of the "totality of circumstances" it considers to control the invalidity of the default here are these: that TWA did not itself comply with Toolco's efforts to pursue pre-trial discovery sufficiently to lay an adequate foundation for the attempt to depose Howard Hughes; that, to similar legal effect, Judge Metzner on January 10, 1963, improperly denied Toolco's request for a Rule 16 hearing and permitted TWA to delay answering interrogatories served on it by Toolco in the fall of 1962 until after the Hughes deposition scheduled for February 11, 1963; that its own compliance with TWA's requests for discovery was substantial and in good faith; and that TWA did not and indeed could never have shown a need to depose Hughes. In sum it argues that in the face of all this, the district court grossly abused its discretion in not resorting to a less drastic alternative remedy before putting an end to litigation on the merits with a default judgment.

Although we agree with TWA that these arguments are unpersuasive, for the sake of clarity we pause to reject TWA's alternative theory that we may not consider the merits of the default judgment because we are required by either res judicata or collateral estoppel to follow the affirmance by the earlier panel of this court of the default judgment entered against Toolco on its counterclaims. Res judicata is singularly inappropriate in this context. As we have noted, leave to Toolco to appeal from the default judgment entered on TWA's antitrust complaint was narrowly confined and the panel expressly reserved the very question at issue here, "[t]he propriety of the court's entering a default judgment against the defendants with respect to the complaint . . . ." Prior to the judgment now appealed from, there had simply been no "final judgment" entered with respect to the merits of TWA's cause of

action against Toolco, and thus we lack the fundamental prerequisite for applying res judicata. See *Moore, Federal Practice* ¶ 0.405[1].

Nor will collateral estoppel avail TWA. The relevant issue "actually litigated and determined in the prior" appeal, *Lawler* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955), was only that Judge Metzner properly entered the default on Toolco's counterclaims. This is a sharply distinguishable issue from the propriety of a different default judgment in favor of Toolco's adversary (this does not follow, as Toolco suggests, because the latter default is more drastic, but simply because the two questions are not the same). The issue of the propriety of the default here is not a right, question, or fact determined on the previous appeal. We believe we can fairly assume that TWA would not attempt to invoke collateral estoppel if the counterclaim had been asserted in a separate action. Combining two claims for trial as permitted for convenience under the Federal Rules does not dissolve the separate identities of the two claims or the two default judgments. Collateral estoppel and res judicata take aim at redundant litigation of identical issues or causes of action; they are not intended to foreclose consideration of the legal merits by analogy—however persuasive the analogies may be.

This is not to say that we will entirely disregard the obvious force of the prior determination on so closely related a question. This is foremost a matter of *stare decisis* and, of course, we *are* bound by collateral estoppel not to reopen subsidiary issues actually determined in the earlier appeal. We are persuaded that the most important considerations that prompted the earlier affirmance of the default on Toolco's counterclaims compel the same result here.

The essential details of the pre-trial proceedings that climaxed in the default are succinctly set out in Chief Judge Lumbard's earlier opinion, 332 F.2d 602, and we will en-

deavor to avoid unnecessary repetition. Because the factors bearing on the two default judgments are not identical, however, and in view of Toolco's attack on the district court's conduct of the pretrial proceedings, we cannot entirely avoid a brief sketch of the history of the litigation prior to the default.

One relatively minor justification put forward by the earlier panel in affirming the default judgment on the counterclaims related to Toolco's noncompliance with two discovery orders entered upon motions made by certain defendants who had been joined in the litigation by Toolco's counterclaim. Toolco now asserts that these production orders concerned matters irrelevant or at least of marginal importance to TWA's complaint. However this may be—and it is virtually impossible, because of the default and the nonproduction of the documents to evaluate this claim—we agree that the failure to comply with orders granted in favor of the other litigants would most likely not in itself have warranted the severe remedy of a default judgment in favor of TWA on the principal action.

But it is also apparent that these production orders are of trivial importance to the propriety of the default judgment in question here, in light of Howard Hughes' deliberate, knowing, willful, and plainly announced refusal to comply with an order requiring his appearance for the taking of his deposition on February 11, 1963, and which had been served long in advance of the return day. The reason that entry of the default was inevitable after Hughes' nonappearance can only be understood against the background of TWA's intensive efforts, first undertaken on the very day that it filed its complaint, to compel Hughes' personal testimony, as a witness and "managing agent" of defendant Hughes Tool Co. under F.R. Civ. P. 37(b)(2). TWA has consistently maintained, and continues to do so, that quite aside from the fact that he was Toolco's alter ego, Hughes' pretrial testimony was absolutely essential

for it adequately to frame the issues and prepare for trial because of Hughes' extraordinary secretive methods of doing business. It was the indispensable nature of Hughes' personal testimony, according to TWA, that prompted its diligent pursuit of Hughes from the inception of the litigation. TWA's campaign to depose Hughes, which opened with a motion for leave to do so on the date it filed its complaint, was temporarily frustrated when the motion was denied and Toolco was granted priority in the taking of depositions. But TWA renewed its efforts with a further unsuccessful motion and proposals to depose Hughes prior to Toolco's depositions. In early January, 1962, TWA adopted a new tactic and repeatedly sought with equal lack of success, to discover Hughes' whereabouts from Toolco. After further futile notices to depose Hughes served in January and February, 1962, TWA achieved a breakthrough when on June 4, the then Special Master rejected Toolco's objections to interrogatories directed to both Hughes and Toolco to locate Hughes so that he might be deposed. Toolco was ordered to answer the interrogatories unless Hughes should authorize counsel to accept service of a subpoena on his behalf for his appearance at the deposition.

On appeal the district court ordered that the interrogatories be answered as modified by it in an immaterial respect. Counsel for Toolco on July 27 informed the Master that Hughes had authorized counsel to accept service of a subpoena for Hughes to appear as a witness. An extended period of wrangling followed. Among other highlights of this period, Toolco refused a proposed stipulation and order to serve Hughes through Toolco's counsel, on the ground that agreeing to the stipulation might prejudice its right to object to the propriety of the deposition. Finally, on September 6, 1962, the same day that TWA charged that a purported authorization for counsel to accept service for Hughes was apparently a forgery, counsel for

Toolco informed Judge Metzner that another lawyer, Chester Davis, had in fact been served that day in California, pursuant to Hughes' personal authorization. On September 13, as part of its indignant response to the forgery allegation, Toolco submitted to the court the notice of deposition, a subpoena to Hughes, an affidavit of Davis stating his authority to accept service for Hughes, and a second affidavit from a Los Angeles notary stating that Hughes had indeed appeared in person before him and had acknowledged Davis' authority.

Subsequently, the district court adopted a decision of Special Master Rankin that Toolco would bear responsibility for Hughes' response to the subpoena, and stated that Hughes would be considered bound by this declaration unless he objected. No objections were ever made and there is, of course, no question that Toolco was responsible for the actions of the owner of all its stock. At Toolco's instance, the deposition date was twice postponed until by order of January 10, 1963, the court affirmed a final date set by Master Rankin requiring Hughes' appearance on February 11, a schedule "to be adhered to in the absence of extraordinary circumstances." Also on January 10, 1963, Judge Metzner denied an application for a Rule 16 pre-trial hearing that had been presented to it by Toolco on September 25, 1962, at the initial suggestion not of Toolco but of the Master. The motion was denied "without prejudice to renew on papers before the Court 30 days after the completion of the deposition of Howard R. Hughes." Judge Metzner also affirmed the denial by the Special Master of Toolco's motion to depose two financial institutions concerned primarily with issues raised by Toolco's counterclaim, the Irving Trust Co. and Dillon, Reed, & Co., on the ground that to grant the motion would interfere with the scheduled deposition of Howard Hughes.

Thus by mid-January Toolco had explored and exhausted myriad possible avenues for further delaying the day of

reckoning. On February 8, 1963, the Friday prior to Hughes' scheduled appearance the following Monday, Toolco announced a strategy decision. That day Toolco's counsel served on TWA and filed with the court a "notice of position" stating that in view of the court's denial of its motion two days earlier to dismiss the complaint, the denial of a certification permitting review of that order under 28 U.S.C. § 1292(b), and because of "the enormous expenses which would be incurred by Toolco . . . in further pre-trial *and trial* proceedings and the belief of Toolco *that such expenses would exceed the amount of damages provable by plaintiff under the complaint*" (emphasis added). Toolco "elects, subject only to whatever judicial relief it may hereafter obtain, to rest on the merits of its positions as heretofore taken so that it may avoid the burdens and expenses involved in further pre-trial *and trial* proceedings prior to the time that an appellate court has the opportunity to rule upon the decisions and orders heretofore made herein" (emphasis added).

At a hearing conducted February 8, 1963, Toolco's counsel, Davis, whose signature appeared on the "notice of position," admitted that "the subpoena on behalf of Mr. Hughes was valid, never was questioned." He also read from the record that portion of a ruling by the Special Master on September 15, 1962, imposing responsibility for Hughes' actions on Toolco, including the Master's comment that "I am piercing the corporate veil as to the Hughes Tool Company, and I am bringing what I hope is clear notice of very substantial sanctions" against Toolco "in case there should be at some later date a . . . failure to respond to the subpoena . . . ." Davis commented that Toolco was "aware of these rulings" and had accepted the responsibility imposed on it by the Master. Davis further explained that he had described to Toolco the sanctions available in the event Hughes should not appear, with particular regard to F. R. Civ. P. 37(d). Davis further

explained that the basis of Toolco's strategic judgment was that which had been expressed in the "notice" a calculation that TWA could not prove damages equal to the expenses of further litigation. Finally, Davis candidly and clearly recognized, and attributed the same awareness to Toolco, "that by insisting on a right to obtain a review on the legal questions which have been decided to date, and should it develop that they are in error . . . as a consequence *they may be deprived of further defending on the merits, other than on the question of damages*" (emphasis added). Davis described Toolco's decision to stand on Hughes' nonappearance as a "business decision" —the wisdom of which Davis himself pointedly would not vouch for—and responded affirmatively to the court's query whether Toolco's position was that "the plaintiff may take whatever proceedings it is advised to take by way of sanctions under Rule 37."

Short of express consent to the entry of a default judgment, a clearer case for the necessity and propriety of such a judgment could hardly be imagined. On appeal, as we have said, the complaint was held sufficient to state an antitrust claim under several theories and after all that was said at the February 8 hearing Toolco could hardly have been shocked that it then found itself left with nothing to litigate but damages.

The language of the panel on the previous appeal with respect to the Hughes non-appearance is as relevant in this context as it was to the issue presented by the default with respect to the counterclaims:

> "When Hughes chose not to appear for this deposition—which action was taken deliberately and with full knowledge of the sanctions available to the additional defendants under Rule 37—Judge Metzner was fully justified in entering judgments dismissing the counterclaims against TWA and the additional de-

fendants. The sanction of judgment by default for failure to comply with discovery orders is the most severe sanction which the court may apply, and its use must be tempered by the careful exercise of judicial discretion, to assure that its imposition is merited. However, where one party has acted in willful and deliberate disregard of reasonable and necessary court orders and the efficient administration of justice, the application of even so stringent a sanction is fully justified and should not be disturbed."

Chief Judge Lumbard further elucidated in words pertinent on this appeal:

"beyond any question . . . the deposition of Hughes was necessary to all aspects of this litigation. Hughes has at all times been sole owner of Toolco and the guiding light behind all the transactions between Toolco and TWA. Both TWA and the additional defendants had the right to depose Hughes.

. . . .

Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. . . . Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery.

Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and

it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation." 330 F.2d at 614-15.

Nor was that panel's references to the necessity of Hughes' deposition to "all aspects of this litigation" gratuitous. It was prompted by Toolco's position on the earlier appeal that Hughes' deposition was relevant *only* to the TWA action and not to the counterclaims. Even if we are not bound in a strict legal sense by the previous ruling that Hughes' deposition was essential to TWA's claim, that holding was manifestly correct. As will be seen, many of TWA's asserted charges relied on interpretations of intent and of the significance of ambiguous projects quickly aborted, and of possible exploratory actions taken by Toolco that may or may not have been relevant to TWA's several antitrust theories. The reality behind the charges could hardly be tested without the testimony of the one man who personally directed Toolco's activities throughout the relevant period and whose singular penchant for secrecy was, after two years of frustrating delay in the conduct of the litigation, well known to the Master and the trial court. Clearly the court was entirely correct in concluding that the litigation would only continue its desultory course without the appearance on stage at the earliest possible moment of the hitherto unseen Prince of the drama. Thus, the court's decisions to postpone all further discovery by Toolco—discovery of the sort which had not substantially advanced the litigation in the past—were not only within its discretion but quite obviously correct. Indeed, in light of TWA's express reliance on Hughes himself to establish as much as 75% of its own case against Toolco, one would have expected that Toolco might have welcomed the opportunity to force

TWA to play the card that it had proclaimed was so important to its case, in the expectation that a disappointing deposition would open the way for an early termination of the case favorable to Toolco. Toolco's argument that TWA had not by February 8 laid a sufficient foundation for its case thus falls as well, because by failing to produce Hughes, Toolco deprived both TWA and itself of the opportunity to establish their respective positions. Finally, the suggestion that the court might have resorted to some sanction short of a default judgment after Toolco had announced a policy decision to take an action that would give it the right to take an immediate appeal—which only a final judgment on the merits would accomplish—and following the willful refusal to produce a witness whom the court had rightly found central to the expeditious progress of the lawsuit, has such an air of unreality about it as to bear its own refutation. Contrast *Rosenberg, Sanctions to Effectuate Pretrial Discovery, Colum. L. Rev.* 480, 495 (1958) (giving party "second chance" desirable in appropriate case).

Toolco intimates that throughout the litigation TWA sought in bad faith to win a fabricated case by exploiting Hughes' known craving for solitude. Nothing in the record would justify any such finding, and in any event the district court did offer to permit the deposition to be taken in as much privacy and under any other conditions that might suit Hughes' aversion to public appearance.

The cases relied on by Toolco are far afield and demonstrate by negative implication the inevitability of the default in this case. For example, in *Gill* v. *Stolow*, 240 F.2d 669 (2d Cir. 1957), the court reversed the entry of a default only upon a showing of a "real attempt to comply" with an order requiring the witness to travel from England to New York for the deposition, a trip the court found actually barred by his ill-health. There, the witness defied doctor's orders to appear for the deposition within

two months of the time scheduled for taking it. As far as we know, defendants have never in the eight years since the default judgment represented that Hughes was willing to be deposed were the default vacated. *Von Der Heydt* v. *Rogers*, 251 F.2d 17 (D.C. Cir. 1958) (per curiam) reversed a default judgment only upon a conclusion that the district court had not adequately set forth its findings. Concurring separately, then Circuit Judge Burger commented that "if the information sought is material to the case and not privileged, and if appellant was able to produce it, failure to produce warrants dismissal." *Id.* at 19. That is precisely the case here, except that the information sought was more than merely "material." It was essential. It could prove to be the life or death of the action. In *Independent Productions Corp.* v. *Loew's, Inc.*, 283 F.2d 730 (2d Cir. 1960), we simply found full compliance with the only court order outstanding at the time of the default judgment and concluded that the default judgment was improperly entered merely because when the witness appeared for the deposition he raised a Fifth Amendment privilege. See also *Bon Air Hotel, Inc.* v. *Time, Inc.*, 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 815 (1968) (Petitioner's failure to comply due to inability brought about neither by its own conduct nor by circumstances within its control did not warrant default judgment). Finally, *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1957), as in *Gill*, reversed a default judgment only on the strength of findings by the Special Master, adopted by the district court, and approved by the court of appeals, that the party had made good faith and diligent efforts to execute a production order where compliance would have violated Swiss law.

Indeed, the circumstances mandating entry of a default judgment here are stronger than in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909), where the party against whom a default judgment was entered claimed a privilege that it urged justified its noncompliance. Despite this,

the Court ruled that because the Hammond Co. "absolutely declined to obey the order," which required production of evidence that the court could only "assume was material," in view of the non-compliance, the default judgment was proper. As in this case, Hammond too relied on the denial of pretrial motions by the defaulting party that would have postponed compliance with or modified the order. The Court found no abuse of the district court's broad discretion to control pretrial procedures.

In light of the foregoing, it would appear that were less at stake in this litigation, the propriety of the default judgment would not have deserved the full discussion we have afforded it. The entry of the default judgment was inescapable and virtually invited by Toolco.

IV.

Toolco, assuming arguendo that we would hold that the default judgment was properly entered against it on TWA's complaint, seeks nevertheless to avoid any liability for the antitrust violations alleged by TWA on the ground that we are required to find as a matter of law that facts essential to establish any such violations, although alleged in the complaint, are in fact untrue and could not have been proved by TWA at a trial. To the extent that the allegations of antitrust infringements are not conclusively disproved, so Toolco asserts, the allegations themselves are either too vague or conclusory or otherwise insufficient to support any recovery whatever. We disagree.

Despite inevitable sharp contrasts of tone and emphasis in the voluminous briefs, the parties do not seem to disagree that Judge Metzner, in preliminary rulings prior to the damage hearing and again in his decision adopting the report of the Master, applied an entirely correct standard in defining the legal effect of a default judgment. We too find Judge Metzner's discussions of the law in this complicated area unexceptionable. Extracting justiciable

standards from the venerable but still definitive case, *Thomas* v. *Wooster,* 114 U.S. 104 (1885), Judge Metzner ruled that by its default Toolco admitted every "well pleaded allegation" of the complaint, a term of art which Judge Metzner interpreted to permit finding an allegation not to be "well pleaded" only "in very narrow, exceptional circumstances:"

> "For example, an allegation made indefinite or erroneous by other allegations in the same complaint is not a well-pleaded allegation. Other examples . . . are allegations which are contrary to facts of which the court will take judicial notice or which are not susceptible of proof by legitimate evidence, or which are contrary to uncontroverted material in the file of the case." 308 F. Supp. at 683.

Judge Metzner then discussed the meaning that the much-mooted phrase "judicial notice" should take in the present context, as distinguished from the much different circumstance of a full trial, and summarized his previous discussion as implying that "only indisputable facts"—facts which could not possibly be rebutted if the non-defaulting party were permitted a trial—may be judicially "noticed" to rebut factual material otherwise admitted by a default. Toolco now attempts to hoist Judge Metzner by his own petard in directing our attention away from the "judicial notice" standard to certain "material in the file of the case" introduced by Toolco during the hearing on damages which according to Toolco has not been "controverted" by TWA. But this argument stands the matter on its head and implies that it was TWA's responsibility to defend the allegations of its complaint by rebutting adverse matter introduced by Toolco in the damage hearing. TWA had no obligation to introduce any evidence whatever in support of the allegations of its complaint. Matter introduced by Toolco to disprove or mitigate damages which only *tends* to contradict the allegations of the complaint has no

legal effect except as it bears on the question of damages unless it could not conceivably have been refuted and disproved by TWA had there been a trial and thus is "indisputable." It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

The applicable principles are clearly implied from *Thomas* v. *Wooster, supra,* where the court held that defendants who had defaulted in a patent infringement suit would not be permitted to show that the patent sued upon was invalid. Defendants had sought to introduce the original patent to show it differed from a reissued patent, which was the patent the plaintiffs sought to enforce. The court ruled that neither this proof nor evidence that defendants had delayed 14 years in seeking reissue were sufficient to defeat the contrary allegation of the validity of the patent contained in the complaint because, *inter alia,* the delay "might possibly have been explained, and the court could not say as a matter of law, it was insusceptible of explanation. . . ." We are instructed by *Wooster* that so long as the facts as painted by the complaint "*might* . . . have been the case" they may not now be successfully controverted by Toolco. There was a time for that and Toolco cannot elect to default and then defend on the merits. It cannot have its cake and eat it too.

Toolco's adversion to TWA's alleged failure to buttress its allegations in effect seeks to have us review the evidence presently in the record as though we were passing on a motion by Toolco for summary judgment supported by appropriate affidavits following normal discovery proceedings and prior to entry of any final judgment. In such

a case, we would grant the motion unless TWA "set forth specific facts showing that there is a genuine issue for trial." F.R. Civ. P. 56(e). But TWA need not introduce any facts whatever in support of its complaint. Judgment has already been entered in its favor on a complaint held on the earlier appeal to this court to state a sufficient claim. Only damages remained to be determined. As Judge Metzner ruled "[w]here file material is involved, if the plaintiff did not have full opportunity to meet or controvert such material, then it should not be used to nullify the allegation." This conclusion is the clear implication of the Court's refusal to permit the admission of the prior patent in *Thomas*.

We have, nevertheless, reviewed all the evidence introduced and relied on by Toolco in its attempt to negative its liability and conclude that Toolco has shown nothing that renders inconceivable the likelihood that TWA could have proved at trial that actions by Toolco which formed the basis for the award of damages were in fact, as alleged in the complaint, violations of the antitrust laws. Although we have found it desirable to set forth and affirm the propositions of law relied upon by the district court and by both Masters involved, it would serve no useful purpose to rehash in detail the arguments which defendants have repeatedly urged to show that the exacting test of *Thomas* v. *Wooster* has been met and which incidentally have been rejected both by Judge Metzner and Special Master Brownell in thorough and well-reasoned opinions.[3]

Briefly, as we said on the earlier appeal, the allegations of the complaint "state the outlines of a tying arrangement, an economic boycott of the defendants' competitors,

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[3] We also are in agreement with the similar statements of the applicable principles of law contained in Brownell's report, as well as those in a preliminary opinion of Special Master Rankin dated July 30, 1965, and in an earlier opinion of Judge Metzner, reported at 38 F.R.D. 499 (S.D.N.Y. 1965).

and an attempt to monopolize commerce, all unlawful under the antitrust statutes." 332 F.2d 602, 611. Specifically, in the first of three claims set forth in the complaint—the only claim upon which TWA introduced evidence of damages—TWA contended that Toolco, 100% owned by Hughes throughout the relevant period, acquired control of TWA and made it a "captive market" for Toolco "with the primary purpose of restraining and monopolizing the trade and commerce" of TWA, which was alleged to constitute a substantial proportion of various defined markets for airplanes, including jets, and related equipment. TWA further alleged that defendants intended that Toolco would become the sole source of supply of jet-powered aircraft to TWA (thus by implication intending to monopolize a substantial portion of a defined market) and a dominant source of supply of jets to air carriers generally; that suppliers to TWA other than Toolco would be boycotted; and that defendants would cause Toolco to supply TWA with aircraft only upon condition that TWA would accept financing dictated by Toolco.

Quite apart from proof of intent, paragraph 9 of the complaint alleged that defendants conspired to restrain trade in violation of Section 1 of the Sherman Act; provided financing to TWA only on the condition that plaintiff buy all aircraft needed for its operations from Toolco; required TWA to boycott all suppliers of aircraft except Toolco; conspired to monopolize the TWA market in violation of Section 2 of the Sherman Act; attempted to monopolize the TWA market, also in violation of Section 2 of the Sherman Act; and sold and leased jets to TWA on the condition that TWA not buy or lease the goods of a competitor of Toolco, in violation of Section 3 of the Clayton Act.

Paragraphs 11 through 29 of the complaint set forth in detail specific acts performed in furtherance of the offenses charged and for the improper purposes alleged, as

outlined above. Thus, according to the complaint, Toolco first acquired TWA with the intent to make it its own market for supplying aircraft, an intention which was carried through into the advent of the commercial jet age during the years 1955-56. In 1956, according to these allegations, Toolco ordered a total of 33 Boeing jets and 30 additional Model 880 jets manufactured by General Dynamics Corporation ("Convair"). At the same time, defendants prohibited TWA from "making any arrangements for the acquisition, by sale, lease, or otherwise, of any jet-powered aircraft." The complaint goes on to say that throughout 1956-60, Toolco refused to assign to TWA the rights to acquire the jets on order from Convair and Boeing, despite TWA's requests that it do so and despite provisions in Toolco's contracts with Boeing and Convair that permitted it to do so. Jets leased to TWA by Toolco on a day-to-day basis in 1959-60 were the only jets made available to TWA during the years 1955 to 1960 and were inadequate to TWA's needs, it was charged. Each lease was conditioned on TWA's agreement and understanding that it would not purchase or lease aircraft from any other supplier. In 1960 six of the Convair 880's Toolco had ordered in 1956 were leased to Northeast Airlines, including three previously assigned to TWA. Similarly, in June, 1959, six of the Boeing jets ordered in 1956 were "diverted to the principal transatlantic competitor of TWA" (Pan Am). While thus restricting TWA's purchases of jets, the complaint alleged that Toolco also inhibited TWA's ability to obtain equity financing and caused TWA to rely chiefly on debt financing, thus rendering TWA unable to finance needed aircraft acquisitions except upon Toolco's approval. Toolco intended by this restriction to increase TWA's dependence on Toolco in furtherance of its unlawful purposes. From 1955-60 defendants prohibited TWA from obtaining financing for the acquisition of jets required for TWA's needs.

The damages which Brownell ultimately awarded to TWA consisted primarily of profits lost as a result of (1) diversion of the six Convair's to Northeast; (2) temporary retention by Toolco of four additional of the ordered Convair's and the ultimate lease of those jets to Northeast; (3) diversion of the six Boeings to Pan Am; (4) the lease, instead of outright sale, of jets in 1959-60; and (5) late delivery of 47 of the 63 jets ordered in 1956, which would have been avoided if, by allegations of the complaint, Toolco had not unlawfully constricted TWA's financing and acquisition of its own jet fleet. Although TWA also attempted to prove other damages resulting from Toolco's manipulation of its financing, and further damage arising from delayed sales of obsolete prop aircraft, Brownell found TWA's proof in these respects insufficient and TWA does not appeal from either determination. No damages were sought to be proved for alleged continuing antitrust violations by Toolco subsequent to December 15, 1960, when Toolco put all its TWA stock in a voting trust controlled by three voting trustees (including Holliday), thus relinquishing control of TWA, an action required as a condition of loans to TWA advanced by various banks and insurance companies to permit the purchase of new jets.

As it did before Brownell and Judge Metzner, Toolco now seeks to discredit primarily one part of paragraph three of TWA's complaint, in which TWA alleged that Toolco had been engaged since 1939 "in the development, manufacture and acquisition of aircraft and related equipment" and its "sale and lease" to air carriers, and to demonstrate the inadequacy of one antitrust theory that, according to Toolco, collapses if the allegations of paragraph three are untenable. Toolco thus would have us find *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947), to be the linchpin of TWA's complaint, without which the remainder cannot hold together. In *Yellow Cab*, the Court reversed the grant of a motion to dismiss a com-

plaint which had alleged that a company engaged in the business of manufacturing taxis had established control of a substantial segment of cab operations in four cities and had exploited its control by extracting exclusive purchasing agreements from its owned cabs and taxi companies, thus excluding other manufacturers from the affected market with the ultimate effect, as the Court said, that "the appellees effectively limited the outlets through which cabs may be sold in interstate commerce." *Id.* at 226. This argument fails at each of three points. Toolco has not established to our satisfaction that TWA could not possibly have proven violations analogous to those alleged in *Yellow Cab*. Even if it had, additional specific allegations of antitrust violations in the complaint other than the one which rests on the holding in *Yellow Cab* are not conclusively disproved by Toolco's evidence. Nor has Toolco demonstrated that TWA's postulates for recovery are in any other manner not "well pleaded."

To disprove the allegation of paragraph 3 that Toolco was a "manufacturer" of commercial airplanes, Toolco relies primarily on (1) CAB opinions and orders dating from 1944-50 that concluded Toolco was not then engaged in or planning the manufacture of airplanes for commercial use, (2) schedules to CAB Form 41 Reports filed by domestic trunk airlines pursuant to 49 U.S.C. § 1377 indicating that between 1950 and 1966 none of these airlines purchased or leased a Toolco-made airplane, and (3) the fact that no TWA annual report ever mentioned the manufacture of a "Hughes plane." These documents, Toolco asserts, conclusively establish that Toolco was never a manufacturer of commercial aircraft and certainly not a competitor with the giant manufacturers—Boeing, Douglas, and Convair—and thus the exclusive dealing arrangements alleged in the complaint are entirely innocuous and incapable of producing the kind of market foreclosure alleged in *Yellow Cab*. Toolco similarly sets out to undermine the allegation that it was a "dealer" in aircraft, again directing attention to

CAB opinions and orders dated no later than 1950 finding no sales or leases of planes by Toolco to any airline but TWA; and again introducing the Form 41 Reports to the same effect but extending to 1961. The thrust of its argument is that under no view of the complaint, given the facts established by these documents, could TWA conceivably have proved more than that Toolco as a parent of TWA engaged in good-faith efforts to rescue it from financial crisis and to operate it as a successful business enterprise. Even if TWA could prove mismanagement by Toolco, that is insufficient, in Toolco's view, to intimate any possible foreclosure of competition—since Toolco was a mere manager or conduit and had no independent competitive significance—and accordingly TWA's theories must be found barren, since danger to free competition is the *raison d'etre* of the antitrust laws and some showing of such a danger in every case is a *sine qua non* of proving their infringement.

Both Judge Metzner and Master Brownell met Toolco's argument in this respect head-on, holding that courts could not consider as conclusively proven, facts merely recited in CAB orders and opinions and in airline reports that are the product of no adversary proceedings, distinguishing between the *existence* of such documents, of which courts might in an appropriate case take judicial notice, and the truthfulness of their contents, which would be subject to contrary proof had the trial precluded by Toolco's default actually been conducted. We agree with the reasoning of both opinions and find the authorities there relied on to be in point and sound. See *Stasiukevich* v. *Nicolls*, 168 F.2d 474, 479 (1st Cir. 1958); *McCormick on Evidence* § 328 at 704, § 330 at 709 (1954); *Morgan, The Law of Evidence*, 1941-45, 59 *Harv. L. Rev.* 481, 482-87 (1946); *McNaughton, Judicial Notice*, 14 *Vand. L. Rev.* 779 (1961).

Moreover the documents described above, while (if their contents were accepted as true) showing that Toolco was

not a major force as a supplier of aircraft other than to TWA, hardly negative the possibility that Toolco possessed independent economic significance, apart from its role as supplier to TWA, sufficient to support proof of any or all the antitrust theories limned by TWA's complaint. There is evidence in the record of activities by Toolco or Hughes that suggest significant movement by Toolco and Hughes toward actual or potential commercial manufacturer or dealership in airplanes, especially jets, and their parts. We cannot say that proof at a trial—prevented by Toolco's conduct—that Toolco was more than a conduit for TWA but rather possessed independent competitive significance with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA.

The evidence that Toolco's interests and ambitions in commercial air flights may have extended beyond mere management of TWA begins with Toolco's admitted role, initiated in World War II and continuing to the present day, as a substantial manufacturer of helicopters and aircraft parts for military purposes (and now of aerospace materials as well). Although Toolco stresses the non-commercial nature of this activity, it is clear that Toolco throughout the relevant period had the technical capability and sophisticated "know-how," to enter the commercial market without untoward delay if it had so chosen. Early in its history, Toolco acquired the rights to the first forty Constellation aircraft developed in cooperation with Lockheed in the early 1940's. Twenty-five of these were intended by Toolco for sale to airlines other than TWA. 6 CAB 153, 155 (1944). During and after the war, Hughes actively engaged in the development (ultimately unsuccessful) of a plan worthy of Jules Verne, for a 700-passenger plywood flying boat for commercial development. Manufacture by Toolco of aircraft in association with AVRO of

Canada, and of Caravelles as a licensee of Sud Aviacion of France, were considered during the middle 1950's. In 1956, Toolco ordered at least 300 Pratt & Whitney jet engines, later sold primarily to Boeing and Pan Am at a substantial profit. The engines could well have been intended for installation in the planned Toolco jets and in any event constituted Toolco as a competitor with other sellers of jet engines.

Also in 1956, secret discussions were commenced within the inner circles of Toolco and TWA for Toolco to manufacture commercial jets, a plan scuttled before the end of that year by the initiation of a CAB investigation into the matter which followed a TWA motion to the Board for approval to purchase up to 25 Toolco-manufactured commercial jets. Through most of 1955, Toolco was engaged with Convair in the development of a jet which again proved unfeasible. Evidence of these last mentioned aborted forays is consistent with allegations in paragraphs 14 and 15 of the complaint that defendants arranged with Convair to develop "a jet-powered aircraft to be manufactured by Convair and to be supplied by the defendants to air carriers" and that "defendants also entered into a plan under which Toolco would itself" manufacture jets to be furnished "both to TWA and to other air carriers."

Additionally, there was testimony that Toolco ordered seven Convair 880s manufactured to the specifications of Capital Airlines and thirteen Convair 990s built for American Airlines' requirements.

Finally, Toolco's activities with respect to the 63-plane fleet ordered in 1956, only part of which was ever delivered to TWA, further support an inference that Toolco contemplated that it was or might become more than a manager for TWA. Thus, Toolco conditioned its order for the Convair 880's on a stipulation that the price to it would be reduced progressively as Convair was successful in selling more of the planes beyond the initial orders by Toolco

and by Delta Airlines, Inc., a condition consistent with possible Toolco participation in marketing the 880. Non-assignment provisions in the purchase agreements do not conclusively negate the capacity of Toolco to have dealt in its Boeing and Convair contracts and priority rights with airlines other than TWA—and of course Toolco did not in fact exercise its right to assign the contracts to TWA. Ultimately, of course, as alleged in the complaint and demonstrated at the damages hearing, defendants did sell or lease 16 planes of the ordered 63-plane fleet to Pan Am and Northeast. As Master Brownell observed, the ability of Toolco to deliver these jets immediately may have given Toolco a significant competitive advantage over their own manufacturers. Late in 1959, Hughes negotiated with Lockheed for purchase of Electras at a time when Toolco's own actions indicated TWA was fully stocked with jets.

Toolco's response to most of these considerations is that each is consistent with a sole intent on its part to deal in aircraft and aircraft parts solely for the benefit of TWA. However, the allegation in the complaint that Toolco refused to assign the rights to the ordered fleet to TWA, although it was empowered to do so under the contracts of sale, is consistent with a contrary inference.

In any event, the question is not whether one inference or another is the stronger but whether Toolco's evidence—in light of its default and thus the absence of a trial—absolutely forecloses the possibility that Toolco enjoyed actual or potential independent competitive significance in the commercial aircraft market sufficient to support a finding of an antitrust violation under any of the several hypotheses put forward in the complaint, including, in addition to the *Yellow Cab* theory, (1) unlawful *intent* to monopolize a substantial portion of the commercial aircraft market in restraint of trade; (2) unlawful conspiracy to do so, see *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products*

Co., 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); (3) enforcement of an illegal boycott, see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); (4) tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa, see *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502-03 (1969); and (5) the lease of Aircraft to TWA on the condition that TWA not purchase or lease aircraft from other suppliers, see *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949).

Toolco's reply brief argues that the allegations of unlawful intent are unduly vague but this is unsupported by the cases it relies on, *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885, 888 (4th Cir. 1934); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (mere conclusory and vague allegations and nothing more, of unlawful attempt or conspiracy to monopolize or to restrain trade, or, simply, to violate the antitrust laws, were held insufficient). By contrast, TWA's complaint alleges specific acts by defendants allegedly pursuant to an intent to monopolize specified markets by means which are described in detail in the complaint. These allegations are both adequate as a matter of proper pleading and sufficiently definite to support an award of damages entered on the default judgment.

Toolco's argument that a conspiracy among Holliday and Hughes, as officers and shareholders of Toolco, with Toolco itself, is as a matter of antitrust law unprovable, is an

and by Delta Airlines, Inc., a condition consistent with possible Toolco participation in marketing the 880. Non-assignment provisions in the purchase agreements do not conclusively negate the capacity of Toolco to have dealt in its Boeing and Convair contracts and priority rights with airlines other than TWA—and of course Toolco did not in fact exercise its right to assign the contracts to TWA. Ultimately, of course, as alleged in the complaint and demonstrated at the damages hearing, defendants did sell or lease 16 planes of the ordered 63-plane fleet to Pan Am and Northeast. As Master Brownell observed, the ability of Toolco to deliver these jets immediately may have given Toolco a significant competitive advantage over their own manufacturers. Late in 1959, Hughes negotiated with Lockheed for purchase of Electras at a time when Toolco's own actions indicated TWA was fully stocked with jets.

Toolco's response to most of these considerations is that each is consistent with a sole intent on its part to deal in aircraft and aircraft parts solely for the benefit of TWA. However, the allegation in the complaint that Toolco refused to assign the rights to the ordered fleet to TWA, although it was empowered to do so under the contracts of sale, is consistent with a contrary inference.

In any event, the question is not whether one inference or another is the stronger but whether Toolco's evidence—in light of its default and thus the absence of a trial—absolutely forecloses the possibility that Toolco enjoyed actual or potential independent competitive significance in the commercial aircraft market sufficient to support a finding of an antitrust violation under any of the several hypotheses put forward in the complaint, including, in addition to the *Yellow Cab* theory, (1) unlawful *intent* to monopolize a substantial portion of the commercial aircraft market in restraint of trade; (2) unlawful conspiracy to do so, see *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products*

Co., 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962); *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968); *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); (3) enforcement of an illegal boycott, see *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); (4) tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa, see *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502-03 (1969); and (5) the lease of Aircraft to TWA on the condition that TWA not purchase or lease aircraft from other suppliers, see *International Salt Co.* v. *United States*, 332 U.S. 392 (1947); *Standard Oil Co. of California* v. *United States*, 337 U.S. 293 (1949).

Toolco's reply brief argues that the allegations of unlawful intent are unduly vague but this is unsupported by the cases it relies on, *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885, 888 (4th Cir. 1934); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969) (mere conclusory and vague allegations and nothing more, of unlawful attempt or conspiracy to monopolize or to restrain trade, or, simply, to violate the antitrust laws, were held insufficient). By contrast, TWA's complaint alleges specific acts by defendants allegedly pursuant to an intent to monopolize specified markets by means which are described in detail in the complaint. These allegations are both adequate as a matter of proper pleading and sufficiently definite to support an award of damages entered on the default judgment.

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illustration of the thrust of Toolco's approach to the question whether the decisive allegations in the complaint are "well-pleaded." Whether TWA might have proven such a conspiracy would have turned on the nature and weight of technical and secretive evidence bearing on the independent economic significance of each of the parties and also on subjective questions of intent and attempt. Toolco's conduct barred even initial exploration of these crucial factual issues. We are reminded that even summary judgment "should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller* v. *Columbia Broadcasting System, Inc., supra* at 473. See also *White Motor Co.* v. *United States,* 372 U.S. 253, 259-60 (1963). We should be far more reluctant to grant summary judgment for Toolco following entry of judgment for TWA, as it now in effect requests us to do, when its own default barred even initial exploration of the crucial factual issues.

V.

The opinions below and the briefs submitted to us on this appeal reveal some confusion as to the proper scope of the hearing on damages. As the authorities cited above illustrate, a default judgment entered on well-pleaded allegations in a complaint establishes a defendant's liability. Also, at the hearing before Special Master Brownell it was incumbent upon TWA to introduce evidence showing the extent of the damages which resulted from the antitrust violations established by the default judgment. The difficulty arises as to a question that Toolco refers to in part II of its main brief as one of "proximate cause." To what extent did the default judgment dispense with a plaintiff's normal obligation to show that damages alleged were proximately caused by Toolco's illegal actions? The answer seems to us inherent in the question.

The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged. Because, however, the damages were unliquidated and uncertain, F.R.Civ.P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show "proximate cause." On the other hand, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries, except as we have indicated that it had to for the purpose of establishing the extent of the injury caused TWA, in dollars and cents.

Thus, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19 (1962), cited by Toolco, the court held that an antitrust plaintiff could not recover for losses attributable to a watered-down product rather than to defendant's acts. To the same effect are the other cases relied on by Toolco, e.g., *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (plaintiff could not recover for losses based on defendant's illegal restriction on its distribution of first-run movies during a period when plaintiff's theatre was not equipped to show first-run movies). TWA purports to dispute Toolco's abstract statement of the appropriate scope of the damage hearing, relying on an unreported district court opinion whose reasoning on the issue of proximate causation we adopted in *Jones* v. *Uris Sales Corp.*, 373 F.2d 644 (2d Cir. 1967). While TWA cites *Jones* for the proposi-

tion that at the damage hearing it had no obligation to show proximate cause in any sense, the central language of the district court opinion in *Jones* which TWA relies upon belies its own assertion: "[t]he causal relationship is stated distinctly in the complaint by the allegation that Penn diverted profits belonging to the defendant Uris. All that remained to be supplied were the identities of the accounts and the enterprise *to which they were diverted*, and the amount of *the profits diverted* . . . ." (Emphasis added.) Implicit in the limiting words we have emphasized is the proposition that it was plaintiff's obligation following the default to establish that any lost profits for which it sought recovery were in fact those whose unlawful diversion was established by the default judgment. The default judgment proved the fact of the diversion (the injury) and its illegality. But to recover damages, plaintiff was necessarily required to establish that those damages were attributable to the diversion. Thus, however well-pleaded the allegation that profits were diverted, plaintiffs in *Jones* could not avoid, to the extent necessary to establish the causal nexus for the recovery of damages, introducing evidence relating to the diversion alleged.

Nor do we believe, contrary to Toolco's assertion, that Special Master Brownell misunderstood this issue. His formulation that the "burden of establishing proximate cause is satisfied *as to liability* if proximate cause is adequately alleged in the complaint" (emphasis added) is consistent with our own understanding of the law and, as we will elucidate shortly, we find his application of the proper principles to have been unexceptionable. In fact, Toolco helpfully reminds us that Special Master Brownell disallowed two major elements of damage alleged by TWA. We have reference to those supposedly arising from the assertions in TWA's complaint that it was chronically underfinanced by Toolco and from TWA's claimed tardy sale of its prop fleet. His conclusions on this score were based on his determination that TWA's proof that those damages

arose from the illegal acts and injuries established by the default judgment was inadequate.

Despite its present broad assertion (perhaps in an excess of caution), that "proximate cause" was in no sense an element essential to establishing recoverable losses, TWA's strategy at the hearing, with respect to the damages actually awarded, was in fact designed to prove causation. To illustrate, and to lay the foundation for our discussion of Toolco's various claims that in several respects TWA's proof of causation was inadequate, we conclude this portion of our opinion by sketching the contours of the evidentiary foundation of TWA's damage award.

TWA's most important witness was Robert W. Rummel, at the time of the hearing TWA Vice President for Planning and Research. Rummel testified to the effect that had Hughes and Toolco not interfered with TWA's operations in the manner alleged in TWA's complaint, TWA would have attempted to acquire in the commercial market a jet fleet of its own consisting of the same 63 airplanes we have made reference to—33 Boeing 707's and 30 Convair 880's—which Toolco did in fact order for TWA and which were ultimately delivered to Toolco in 1959-60. As we have noted, major elements in the damages awarded were losses incurred by TWA and caused by Toolco's diversion of 16 of these jets, 6 Boeings and 10 Convairs, to Pan Am and Northeast and delays in the delivery of the Boeings and Convairs that were not diverted. Brownell accepted only in part Rummel's testimony that the delays in the Convair deliveries were solely attributable to Hughes's misconduct, but he fully accepted Rummel's testimony as to the makeup of the "reconstructed" 63-jet fleet. His report concluded that only the Convair delays beyond those provided in a March 2, 1960, amendment to the original delivery schedule were chargeable to defendants, since delays reflected in that amendment were caused by Convair's own mismanagement.

John B. Connelly, Vice President and Assistant General Manager of Boeing Aircraft Division corroborated TWA's

claim that delays in Boeing deliveries were caused by defendants' failure to negotiate with reasonable diligence for priorities in delivery dates in 1955 when jets were first offered commercially. The thrust of the Connelly-Rummel testimony was that if defendants had not, as alleged in the complaint, prevented TWA from negotiating for itself, it would have ordered and received a full 63-jet fleet sooner than it in fact received the abbreviated 47-jet fleet from Toolco. Apart from a portion of the Convair delays, Brownell credited this evidence in its entirety. The illegality of Toolco's arrogation of all authority for buying aircraft was, as we have said, conclusively established by the default judgment.

Two other fact witnesses for TWA testified as to losses caused by disruptions in the transition from prop to jet operations attributable to defendants' interference with the Convair 880 deliveries. The Special Master adopted their computations without reservation and, except for Toolco's attack on the underlying finding of disruption already referred to, Toolco does not seem to press its argument that the proof with respect to these items was inadequate.

The testimony of TWA's four expert witnesses fared somewhat worse with the Special Master than did that of its so-called "fact witnesses." Brownell rejected a "Comparative Profit Study" report comparing TWA's actual profits with two of its competitors during two separate periods offered in an effort to prove TWA's losses. The report was prepared by Coverdale & Colpits, a consulting engineering firm, and testimony concerning it was given by a partner in the firm, Edward L. Wemple. The Special Master did, however, accept the computations contained in a second Coverdale report tracing in detail the operating losses attributable to Toolco's disruption of the jet fleet for the years 1959-63. These computations included an estimate of increased profits that would have accrued had

TWA owned outright certain Boeing 707's which Toolco only leased to it in 1959-60, as well as of profits that would have been realized otherwise from timely delivery of the reconstructed fleet.

TWA also attempted to prove damages resulting from Toolco's inadequate financing of TWA by introducing a study prepared by Drexel Harriman Ripley, Inc. (the DHR study) testimony concerning which was given by its Senior Vice-President, Edward J. Morehouse. Morehouse testified that if TWA had been independently and competently managed during 1955-60, it could have financed the purchase of the reconstructed fleet at much lower costs than those actually incurred through Toolco's management. The program of independent financing described by the DHR study was rejected by Brownell, as was a report prepared by R. Dixon Speas Associates estimating TWA losses from belated sales of piston airplanes.

Finally, John C. Biegler, a partner of Price Waterhouse & Co., testified with respect to a report in evidence and prepared by his firm under his supervision which reconstructed TWA's historical financial posture on the basis of TWA's evidence of disruptions and their supposed effects which were caused by Toolco. The Price Waterhouse study, as supplemented at times during the hearing, was the vehicle through which evidence of both sides bearing on the effect on TWA operations of supposed Toolco disruptions was translated into differences between actual and hypothetical TWA profits.

Toolco's direct case consisted of testimony of four expert witnesses, Gene M. Woodfin, partner in Loeb, Rhoades & Co., investment brokers, and Nathan S. Simat, Robert I. Helliesen and L. John Eichner, principals in the aviation consulting firm of Simat, Helliesen & Eichner, Inc. Each of defendants' experts sought to discredit the evidence of Wemple, Morehouse, and Speas.

Thus, as is apparent from the above summary, TWA did not rely only on its default judgment but introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA. Toolco contends, however, that TWA's proof should have been rejected by the Special Master and that TWA has not established that the delays in delivery, the diversions, or the Boeing leases caused any damage to TWA attributable to those acts and injuries.

VI.

Both sides agree that Special Master Brownell's findings, adopted by Judge Metzner, may not be disturbed at this juncture unless we agree with Toolco that they are "clearly erroneous," F.R.Civ.P. 52(a), the standard also properly applied by Judge Metzner himself in reviewing the Master's Report, F.R.Civ.P. 53(e)(2). Our function would seem to be in a sense redundant, since it appears that each of the substantial objections to the Master's conclusions raised by Toolco before us has already been considered and rejected by the district court. But because of the huge sums involved in this litigation, we have not been content to rest on Judge Metzner's appraisal of the Master's findings and have made our own independent review of those findings. We agree with Judge Metzner's assertion that it is relevant that Special Master Brownell's report is a product of "painstaking" analysis of highly complex questions following hearings on damages which extended over a period of two years, consisting of hundreds of hours of testimony and producing a transcript of 11,000 pages. See *Badenhausen* v. *Guaranty Trust Co.*, 145 F.2d 40, 53 (4th Cir. 1944), *cert. denied*, 323 U.S. 797 (1945); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949). We might add that his report reflects an extraordinary awareness of the issues raised and the applicable principles of law.

In this connection we observe that the Master, in considering the proof of both parties, did so with explicit reference to the classic statement of the applicable guidelines expressed in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), permitting an award in cases such as this to be based "upon probable and inferential, as well as direct and positive proof," and imposing on the wrongdoer any "risk of uncertainty which his own wrong has created," *id.* at 264. Indeed, the Supreme Court recently observed:

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."

Zenith Radio Corp. v. *Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969). In this case the reference to risk in *Bigelow* would seem to have even greater application. Toolco must bear the responsibility for any lack of preciseness of proof, and there is good reason that this should be so. The default itself by Toolco rendered precise proof of damages even more difficult than in the usual antitrust case, where the plaintiff may avail itself of the full battery of discovery procedures to prove damages as well as to prove liability. Toolco cannot be permitted to block the discovery of precise, clear and direct evidence and then be heard to complain that the evidence should have been more convincing.

In any event, our answer to each of the many objections that Toolco raises to the specific findings of the Special Master as to the "proximate cause" of the damages awarded TWA, is that each of the challenged findings is amply supported by evidence introduced during the hearing and that none is "clearly erroneous." Toolco's argu-

ments on this score are principally five, each of which we shall discuss sufficiently to demonstrate the basis for the Master's conclusions.

1. Toolco attacks first the validity of the entire basis of the damage award, the reconstructed 63-jet fleet which Brownell found constituted "a proper basis for computing damages." That he was justified in doing so is established first by Rummel's testimony that TWA *should* in fact have ordered the fleet that Toolco ordered for it, although with more dispatch. Rummel was TWA's senior engineer in 1943, chief engineer in 1949, elevated to Vice President in charge of Engineering in 1956, was throughout this period closely associated with Hughes himself in his early exploration of the commercial jet market and indeed may have been the only individual with whom Hughes entrusted a share of responsibility for aircraft procurement. Rummel testified that he reported directly to Hughes, had authority to commit funds under Toolco's contracts, and "the Toolco factory representatives at Boeing and Convair reported to me as special representative of Toolco responsible for the technical administration of the Toolco contracts . . . ." His primary responsibility throughout most of his employment with TWA "has been to recommend what size and what type fleets to procure . . . ." In addition to the historical fact that Rummel, chief procurement officer for TWA at the time and Hughes' confidant, participated in and concurred in the decision to acquire the 63-jet fleet, the assumption that TWA would have acted approximately as did Toolco in the interest of exploiting to maximum financial benefit the enormous potential of the jet age is entirely reasonable. Indeed, in view of the well-pleaded allegations of the complaint, asserting that defendants did not always act in the best interest of TWA, and defendants' contrary assertion that it did always so act, it ill-behooves defendants now to suggest that a well-managed TWA would have acted differently in evaluating its jet fleet requirement than did Toolco.

Assuming then that an independent TWA would have attempted to acquire the same 63-jet fleet ordered by Toolco, defendants contend that TWA would not have been able to finance such an undertaking, which would have cost about $353 million or $93 million more than TWA actually spent for its 47-jet fleet. Toolco notes that $100 million of the financing for the 47-jet fleet was supplied by Toolco itself through its purchase of TWA subordinated debentures. We find untenable Toolco's characterization as insufficient to support the Special Master's contrary assumption that an independent TWA would and could have financed the full 63-jet fleet, the evidence that United, American, and Pan American Airlines each were in fact able to finance comparable ventures during the same period. Toolco directs our attention to financial reversals experienced by TWA during the period preceding the time Brownell assumed TWA would have financed the fleet (1958-59). But the well-pleaded allegations of the complaint demonstrate conclusively that crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support, was part of defendants' overall antitrust violation. See Complaint ¶¶ 17, 18, 19, 22, 23, 24, 26, 50, 51, and 52(a). To the extent of negating Toolco's attempted reliance on TWA's asserted financial weakness, these allegations must be given effect. Any inferences other than that an independent TWA would have fared neither better nor worse than competing airlines in financing its jet fleet would have been unwarranted.

3. Assuming then that the 63-jet reconstructed fleet was a reasonable basis for assessing damages, Toolco nonetheless insists that Special Master Brownell erred in his findings that in several respects (concerning the delays in Boeing and Convair deliveries; the leasing of Boeings to TWA; and the diversion of 16 jets to TWA's competitors) an independent TWA would have been managed to better financial advantage. It first attacks the assumption, fully supported by testimony of Rummel and Boeing Vice-Presi-

dent Connelly, that more diligent bargaining for Boeing jets would have resulted in TWA enjoying approximately the same rights to priority in deliveries as did Pan Am, American and United. Rummel's testimony adequately supports the conclusion that TWA would and could have engaged in negotiations reasonably "calculated to preserve TWA's competitive position in the industry for early deliveries," to quote Brownell's words. Connelly, who was in a position to be entirely familiar with Boeing's policies with respect to delivery dates,[4] testified, contrary to Toolco's present contentions, that more diligent efforts by TWA would in fact have resulted in substantial parity of priorities.

Because of Master Brownell's and Judge Metzner's thorough discussions of these questions, and in the interest of curtailing this necessarily protracted opinion, we will not continue to discuss each of the other fine-drawn points raised by Toolco in an attempt to discredit this testimony. It is sufficient that we note we have thoroughly considered each of them and found them insufficient to support a holding of clear error.

4. Special Master Brownell concluded that defendants' dalliance in securing Convair deliveries and its active interference with Convair's production schedule was responsible for delays beyond the amended delivery schedule. This finding is amply supported by evidence of (1) Hughes's refusal to accept delivery of the Convair 880's when Convair was ready to deliver them; (2) his assumption of personal control of all matters concerning the deliveries and his direction that TWA was not to proceed with any acceptance procedures without personal clearance from Hughes; and

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[4] Connelly testified that as Director of Contract Administration he was a member of a "headquarters group" at Boeing in 1955 and in 1956 became Vice President and General Manager in charge of the department at Boeing in which responsibility for commercial airline programs was centralized.

(3) Hughes's personal instructions to Toolco armed guards at one point to forcefully seize four CV-880's from the Convair production lines, thereby aggravating Convair's production difficulties. Moreover, it was uncontested that TWA received its planes on an average approximately 9.9 months later than provided in the original schedule, while deliveries to Delta were delayed by only 1.4 months.

5. Finally, the Master's assumption that TWA as a non-handcuffed independent operator would have purchased outright nineteen Boeings leased to it by Toolco in 1959-60 is supported by evidence in the DHR study establishing that as a general rule outright ownership was more desirable than leasing under the conditions existing at that time, subject to certain exceptions not applicable. Also, in cross-examination, defendant's expert Woodfin, admitted that the 1959-60 leases were an interim and unsatisfactory arrangement. The Master's observation that, of 2,036 aircraft operated by certified route carriers on December 31, 1960, only 117 were leased, is also relevant.

VII.

Our response to Toolco's objections to certain calculations by Special Master Brownell of damages, given that the elements of injury to TWA—from late deliveries, non-deliveries, leases instead of sales, and resultant disruption—were properly established, as we believe, is based on the same rationale that underlies our conclusions in the preceding portion of this opinion. Once again, we find none of Brownell's findings to be clearly erroneous.

There are essentially two issues raised with respect to the calculation of damages, which seem to be subdivided for purposes of analysis and emphasis many times in the briefs. The first concerns the degree of injury due to Toolco's failure to deliver the 10 diverted Convairs and 6 diverted Boeings in light of the size of TWA's jet fleet over the period of five years, 1959-63, for which dam-

ages were assessed. Toolco claims alternatively that certain aircraft purchased by TWA during that period made up for at least part of the lost profits that would otherwise have been incurred as a result of the lost 16 planes. Moreover, to the extent the losses were not thus compensated for, Toolco would attribute the fault not to the diversions but to the failure of TWA's new management to "mitigate" damages by purchasing other jets to replace the diverted ones (as we have noted, three voting trustees, two of whom were not controlled by defendants, assumed control of Toolco's voting stock on December 15, 1960). We do not believe that these claims are inconsistent, as TWA asserts. Rather they amount in the aggregate to a single contention that TWA did in fact partly mitigate damages but could and should have done so entirely, or at least to a greater extent.

The second issue raised is based on the argument that even if TWA's fleet size was decreased as a result of Toolco disruptions to the extent found by Brownell, one cannot calculate the extent to which the larger fleet would have increased TWA's profits.

A. *Fleet Size.*

All the issues raised with respect to the decrease in the size of TWA's fleet attributable to Toolco's mismanagement turn on the conflict between the testimony of Toolco's experts and that of TWA's expert, Wemple, of Coverdale & Colpits, who prepared and gave testimony concerning two reports estimating damages, assuming TWA had received the full reconstructed 63-jet fleet on schedule, rather than 47 jets late. As we have said, Brownell rejected one report, the Comparative Profits Study, but accepted entirely the calculations of the other, which we will refer to as the Wemple study. To rebut the Wemple study, Toolco introduced a report by Simat of Simat, Hellieson & Eichner, Inc., which Brownell rejected in its entirety.

According to the evidence accepted by Brownell, the six Boeings were diverted to Pan Am between November 5, 1959 and June 8, 1960 (they would otherwise have been received by TWA between July 19, 1959 and May 9, 1960). The ten Convairs were to be received between December 1959 and September 1960. On March 5, 1959, Toolco told TWA that it would not receive the Convairs. Six were then diverted to Northeast (and in 1963 repurchased by TWA). The other four were retained for a time by Toolco, then sold to Northeast (and never bought by TWA).

Brownell accepted Wemple's estimates that the Convair diversions resulted in the loss to TWA of the use of 5.1 planes in 1960, 9.9 planes in 1961, the 10 planes in 1962, and 7.9 planes in 1963. The six Boeings, unlike the Convairs, were suitable for international as well as domestic use. Brownell accepted Wemple's conclusion that their diversion resulted in a loss to TWA of use of the following quantities of planes in the stated years, for international and domestic use:

	International	*Domestic*	*Total*
1959	0.2	none	0.2
1960	3.6	1.4	5.0
1961	3.7	2.2	5.9
1962	4.8	1.0	5.8
1963	0.9	0.5	1.4

The markedly lower figures in each category for 1963 reflect the purchase by TWA in that year of the six diverted Convairs and the lease for use in 1962 and 1963 of five Boeing B-331B's (as substitutes for the diverted B-331's).

Brownell also accepted Wemple's testimony that even if it had received its full 63-jet fleet on schedule, TWA would still have leased, as it in fact did, four B-720B

aircraft (a medium range late model Boeing) during 1961-62 and would also have purchased 18 additional B-131B fan jets in 1962. Thus, these purchases were not considered as mitigating the damage caused by Toolco's diversions.

Toolco argues that there is no justification for Brownell's refusal to consider the purchase and lease of these B-720B's and B-131B's as at least partially mitigating damages. Alternatively, it contends that there is no support for the conclusion that any deficiency in TWA's fleet existing in 1959-60 as a result of Toolco's diversions, could have had effects that lingered for four years, into 1963, three years after Toolco relinquished control of TWA. Rather, Toolco insists, at least by 1962 and 1963 any deficiencies in the TWA jet fleet must be attributed either to TWA's business judgment that investment in replacements was not economically justified (thus there could have been no damage resulting from the earlier diversions) or to TWA's unjustified refusal to mitigate damages. The cumulative thrust of this pincer argument is that if TWA would have profited, as Brownell found, from the lost jets, why did not TWA replace them? If it would not have profited, there can be no damages.

We find Wemple's testimony that the B-131B purchases and the B-720B leases did not represent "substitutes" for the lost jets justified by several considerations. First, these assumptions were based on Wemple's background of expertise, and there is no basis in the record for finding they were dictated by TWA's counsel, as Toolco maintains. Second, no airline which commenced using commercial jets in the period during which damages were assessed stood pat and remained contented with its originally acquired fleet during that time. Thus, between 1960 and 1963, Pan Am increased its jet fleet from 38 to 64; United from 34 to 91; and American from 25 to 73 jets. It is entirely reasonable and appropriate to assume TWA

would also have expanded its fleet. Thus, it was not for the Master to conclude that the damages caused by the diversions had been entirely mitigated as soon as TWA acquired a fleet of 63 jets, as it did during 1962. It was not until 1963, the last year for which damages were assessed, that TWA obtained a fleet comparable to the 63 jets it should have had in 1959-60, plus those that it acquired in the meantime. Moreover, the transcontinental but not international-range B-131s may not have been an effective substitute for either the lost intercontinental-range B-331's or the diverted intermediate range Convairs. Finally, we note that Toolco failed to present a single expert witness to challenge the claim that the interim acquisitions did not mitigate damages, or to present an alternative assumption; indeed, Simat, Toolco's own expert, relied on Wemple's contention in this respect.

In support of its claim that TWA failed to mitigate damages, Toolco specifically cites (1) TWA's termination of the B-720B leases in 1962; (2) the decision of a Flight Equipment Committee appointed by TWA in 1961 to lease *only* four B-720B's, instead of six, as recommended by Rummel; (3) a reduction in its order of the B-131B's from an original 20 to only 18 actually purchased in 1962; and (4) its refusal in 1961 to buy the four CV-880's retained by Toolco which were ultimately sold to Northeast.

It is sufficient response to the latter contention to note that the complaint alleges that Toolco offered the CV-880's only on the illegal condition that TWA would not buy jets from Boeing, and Toolco has not shown that this contention was not well-pleaded. This adequately explains TWA's refusal to purchase the CV-880's offered by Toolco. Moreover, there is evidence that neither the B-720B's nor the B-131B's were adequate substitutes for the diverted jets, and thus TWA's actions with respect to those planes are not necessarily indicative of its ability and thus of a deliberate refusal to compensate for the diverted air-

craft. In any event, the burden of proof to establish failure to mitigate damages was on Toolco, see *Ellerman Lines Ltd.* v. *The President Harding*, 288 F.2d 288, 291 (2d Cir. 1961); *United States* v. *Warsaw Elevator Co.*, 213 F.2d 517, 518-19 (2d Cir. 1954); *United States* v. *Russel Electric*, 250 F. Supp. 2, 20 (S.D.N.Y. 1965), and Toolco failed to demonstrate TWA's financial capability to purchase substitute jets deliverable before 1963, or that any such jets were on the market. There is evidence in the record indicating that the lead time in the purchase of jet-powered aircraft, each of which is tailor-made in many respects for the specific customer, is several years. Finally, a holding, in the face of no evidence to the contrary offered by Toolco, that TWA was financially able in the time immediately after the transfer of control to restock its depleted fleet, would not be consonant with the allegation of ¶ 53(a) that Hughes's mainipulations of TWA had left it financially debilitated.

B. *Lost Profits From Decreased Fleet Size*

Toolco also attacks Wemple's testimony credited by the Special Master, that even if TWA had received all 63 jets, the additional 16 jets would have enjoyed a "load factor" (measure of the number of passengers carried on an average trip) equal to the average load factor for all jets of the same types during the years for which damages were assessed. Toolco's principal argument is that its own expert was correct in (1) considering the probable depressing effect on demand of introducing new jets into the commercial air flight market and (2) basing his estimates on TWA's specific records of profits for each of its separate jet routes.

But adding 16 planes to the market would have increased overall capacity of domestic American air carriers by only 3.7% at most. It is entirely reasonable to believe that TWA's new, modern jets would have attracted at

least as many extra passengers to TWA as might have been lost because of the added capacity. Thus one does not have to strain to recognize that TWA's competitors would have borne a loss of passengers. In any event, the effect hypothesized by Toolco is highly speculative and Toolco has not carried its burden of proof on this score.

Moreover, Toolco's approach of calculating the potential market for the lost planes only by looking at the capacity of each existing TWA route to absorb the new capacity is too rigid and the Master was not clearly in error to reject it. There is no reason to believe TWA could not have arranged its schedules to maximize its profits.

Finally, there is simply no sound reason to accept Simat's assumption that international competitors of TWA would have increased their transatlantic jet flights by four for each flight added by TWA. The Master was justified in rejecting this guesswork.

C. *Accounting Adjustments in the Price Waterhouse Study*

Toolco seeks to challenge certain adjustments made in the Price Waterhouse financial analysis, upon which both parties relied throughout the hearing to show the financial impact on TWA of various competing or alternative assumptions, some of which were ultimately resolved in favor of TWA, and some in favor of Toolco. Contrary to the claim in Toolco's reply brief, these adjustments were made by Price Waterhouse, not Biegler, who directed the study and testified concerning it. In Plaintiff's Exhibit 50, Biegler merely summarized the adjustments already made by Price Waterhouse and which were previously incorporated in its study. The exhibit included an index of references to the Price Waterhouse study that explained and justified each conclusion. Toolco raised no objections to any of these adjustments before the Special

Master, although it had ample time to study the Price Waterhouse report prior to Brownell's decision and in the face of Judge Metzner's clearly expressed and entirely appropriate suggestion that any technical problems that might arise after Toolco had thoroughly scrutinized the report should first be referred to Brownell so that rebuttal evidence could be put in the record. Toolco's failure to do so is inexcusable, particularly in litigation as complex and difficult as this is. It is precluded from raising these issues now since its conduct has denied TWA an opportunity to submit its own evidence on these intricate accounting matters to the Special Master.

In any event, Brownell's acceptance of the adjustments relied on by both parties and to which no objections were made can hardly be assigned as plain error unless the defect is patent and obvious on the face of the report. We find none of the adjustments complained of clearly erroneous, and indeed most, if not all, seem clearly justified as reflecting reasonable accounting procedures.

VIII.

In its May 3, 1963 order entering the default judgment on TWA's complaint, as we have already noted, the district court also granted TWA's motion to increase the trebled ad damnum from $105,000,000 to $135,000,000. Toolco assigns this as error under F.R.Civ.P. 54(c), which provides that "a judgment by default shall not . . . exceed in amount that prayed for in the demand for judgment." Although the authorities do not appear to be in agreement and this Circuit has not expressed itself on the question, we are of the view that there is no sound basis for restricting TWA to the precise damages originally sought in a case where damages alleged were unliquidated, and where defendant did not default by non-appearance, but rather because of non-compliance with discovery procedures, and indeed was granted a full trial on the question of dam-

ages actually caused by the allegations established by its default. See *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963); *Sarlie* v. *E. L. Bruce Co.*, 265 F. Supp. 371 (S.D.N.Y. 1967); 6 Moore, Federal Practice ¶¶ 54.61, 55.08 at 1206. Toolco cannot in good conscience complain of any unfairness or surprise, for, as we said in discussing the propriety of the default judgment, at no time has it sought to rectify its refusal to cooperate with the legitimate discovery orders, an act it easily could have performed after Judge Metzner granted the motion to increase the ad damnum. Moreover, at the February 8 hearing, prior to Hughes' non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled $135 million.

IX.

Judge Metzner awarded attorneys fees to TWA of $7.5 million based on the time expenditure of 56,000 hours and taking into consideration many relevant factors which are each thoroughly discussed in his opinion, 312 F. Supp. 478. Toolco assigns the award as error largely on the basis that the hourly rate (about $128) is excessive, thus ignoring the unprecedented size of the judgment (the allowance for attorneys fees is less than 6% of the award of damages), the complexity of the proceedings, and the fact that the default judgment was the product of intensive pre-trial activity for two years and was followed by exhaustive appeals and intricate damages proceedings during which Toolco persistently attempted to undo the effects of its own default. In extraordinary litigation such as this, it would be artificial to fix an arbitrary hourly rate without regard to other relevant factors, for example, quality of the representation, the success achieved, and the size of the award. There are no exact formulations of which we are aware, that would require a precise maximum hourly fee to be fixed in a vacuum. Under all the circumstances, especially in view of Judge Metzner's meticulous discussion

of the problem, we are unable to say that he exercised his broad discretion in this respect unreasonably. *W. Montague & Co.* v. *Lory*, 193 U.S. 39, 48 (1904); *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 245 F. Supp. 258, 302 (M.D. Pa. 1965), *vacated on other grounds*, 377 F.2d 776 (3d Cir. 1967), *reversed in part on other grounds*, 392 U.S. 481 (1968).

TWA's Cross-Appeal

The five points raised by TWA on its appeal do not call for more than summary discussion.

X.

Its only objection to Brownell's computation of damages is that he sensibly permitted a deduction from TWA's damages for the cost of capital that TWA would have incurred if it had independently purchased its 63-jet reconstructed fleet because of interest charges that TWA would have incurred if the necessary capital had been borrowed in 1958-59. The Special Master calculated a somewhat higher interest rate (6.3%) for the Convairs than for the Boeings (6%) because the Convairs under the reconstructed plan would have been delivered later than the Boeings. In arriving at a rate of 6.3%, the Master relied on average interest rates charged to other airlines for similar loans during this period, and indeed paid by TWA itself on its own comparable indebtedness during that period. The 6-6.3% rate is identical to that which TWA's expert Morehouse had computed in a portion of his rejected financing plan which contemplated some additional borrowing, in 1959, supplementing earlier financing in 1955 at lower rates.

In seeking a smaller deduction for interest costs, TWA relies on (1) its Exhibit No. 314, showing interest rates on debts outstanding to various airlines in 1960, but without regard to the times that the debts were incurred or

the purposes for which they were incurred; (2) the rejected Comparative Profits Study; and (3) a Price-Waterhouse estimated financing charge premised on the rejected Morehouse report. For the reasons just indicated, each ground asserted is insufficient to establish that Special Master Brownell's adoption of the higher rate was clearly erroneous. In the absence of a viable alternative offered by TWA (and TWA does not contest the rejection of the Morehouse and Comparative Profits studies) the Master properly based his deduction for interest charges on the price of money at the time when financing would normally have been arranged for the 63-jet fleet.

XI.

TWA also argues that the interest allowances on the damage award and the judgment itself were incorrect.

TWA contends that it was improperly denied moratory interest as an element of "the damages sustained" by it under Clayton Act § 4, 15 U.S.C. § 15, to be computed from the time the damages were sustained and trebled to the date of judgment. We agree with the Seventh Circuit's contrary resolution of this issue in *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). It is reasonable to interpret Congress' silence on the matter as indicating that trebled damages are sufficient penalty and that interest need not be included. See *Rodgers* v. *United States*, 332 U.S. 371 (1947). Moreover, trebled damages will more than adequately compensate TWA for its injuries. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). Thus, there is no inherent policy reason to award moratory interest here and not doing so avoids difficult questions of proof—including highly abstruse inquiries as to proper rates and the time from which interest should run. Since the trebled damage device in any event adequately serves the penal and remedial purposes of the antitrust laws, we believe that it

is sounder, absent contrary express Congressional intent, to consider that these difficult and time-consuming inquiries are intended to be avoided.

TWA also urges that interest on the judgment should run from the time the Master filed his report, rather than from the date of the district court's judgment, contrary to the apparently clear language of 28 U.S.C. § 1961, which speaks of an award of interest "from the date of the entry of the judgment" and applies by its terms to "any money judgment . . . recovered in a district court." TWA is not, as it attempts to show, "penalized" in any sense by any delay in judgment occasioned by the court's discretionary referral of the case to a Master. To the contrary, the salutary device of having the highly complex questions in this case heard and analyzed by a Master served to expedite this litigation. TWA cites no authority in point for its position [6] and we perceive no good reason to adopt its novel argument in the face of the plain words of Section 1961.

We do, however, agree with TWA that under New York law, applicable here pursuant to 28 U.S.C. § 1961 (interest on the judgment is calculated "at the rate allowed [on such judgments] by State law"), interest on the judgment should be at the rate of 7½% rather than the 6% allowed by Judge Metzner. Under N.Y.C.P.L.R. § 5004, interest on

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[6] *Tilgham* v. *Proctor*, 125 U.S. 136 (1888), and other patent cases relied on by TWA do not involve the question of when interest begins to run on a judgment, but rather from when interest as an *element of damages* should be measured. The holding of the cases cited is that interest should run from the date that the fact and amount of damages cease to be "in earnest controversy and of uncertain issue," *id.* at 161, an event marked by the filing of the Master's report. Since we determine that moratory interest is inappropriate here, these cases are inapplicable. In *L. P. Larson, Jr., Co.* v. *Wm. Wrogley, Jr., Co.*, 20 F.2d 830 (7th Cir. 1927), a trademark and unfair competition case, the question at issue was also the time from which interest would be assessed "as an element of damages." *Id.* at 836. See also *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F. Supp. 383, 417-18 (D. Md. 1963).

money judgments in New York "shall be at the legal rate." When this section was first adopted in 1963, it clearly referred to the rate then set as the maximum allowable interest rate prescribed by Gen. Bus. Law § 340 (6%). Section 340 was subsequently superseded by an identical provision codified as § 5-501(1) of the N.Y. Gen. Obl. Law. In 1968, that provision was amended to give the State Banking Board discretion to set the maximum rate of interest allowable on loans or their equivalent. The 6% rate was thereafter to prevail only if the Board prescribed no other maximum lending rate. In February, 1969 (the Court's judgment was filed in 1970), the Board prescribed a rate of 7½%.

Ever since the amendment to Section 5-501(1), there has been a lively controversy among New York courts and commentators as to which rate governs money judgments —6% or the rate set by the Board. The commentator to the C.P.L.R. argued persuasively in 1969 (see N.Y.C.P.L.R. 1970 Supp. at 146-49) that the sounder view was that the Board's rate should prevail, since the purpose of C.P.L.R. § 5004 was to set interest on money judgments at the going rate at the time in New York State, and the purpose of amending Section 5-501(1) was to permit that rate to be responsive to changing economic conditions. The commenator saw no need for leaving the rate of interest on judgments rigid after the state had determined that for commercial purposes the rate should be more flexible.

We agree with this reasoning. Toolco relies on our contrary decision in *Caldecott* v. *L. I. Lighting Co.*, 417 F.2d 994 (2d Cir. 1969), where we followed the tentative view of the then highest state court ruling on this question, *Belcher* v. *Kesten*, N.Y.L.J. July 29, 1969, p. 11, col. 7 (Sup. Ct. Queens County). Since *Caldecott* was decided by us, the Appellate Division, First Department, has unanimously held in *Rachlin & Co.* v. *Tra-Max, Inc.*, 308 N.Y.S. 2d 153 (March 5, 1970), that the 7½% rate should apply to a money judgment on a claim founded in contract. We see no

sound basis for distinguishing contract from tort actions in fixing the appropriate rate of interest on a judgment and since *Rachlin* is presently the most authoritative declaration of New York law interpreting C.P.L.R. § 5004, we will modify the judgment of the district court and direct that interest run from the date of the judgment at the rate of 7½%.

XII.

TWA's last contention is that it should be compensated for fees paid to its experts as part of its "cost of suit," 15 U.S.C. § 15. This precise issue has long since been decided contrary to TWA's position in this Circuit, *Straus* v. *Victor Talking Machine Co.*, 297 F. Supp. 791 (1924) and TWA has not persuaded us that that decision, or the unanimous host of cases relying on *Straus* in this and other jurisdictions should be overruled. See e.g., *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964); *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F.2d 561 (10th Cir. 1961), cert. dismissed sub nom. *Wade* v. *Union Carbide & Carbon Corp.*, 371 U.S. 801 (1962); *Farmington Dowel Prods. Co.* v. *Forester Mfg. Co.*, 297 F. Supp. 924 (D. Me.), aff'd and remanded, 421 F.2d 61 (1st Cir. 1969).

The judgment is modified to allow 7½% interest on the judgment. In all other respects, the judgment of the district court is affirmed.

N.

Orders of September 28, 1971

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

34902 & 35114

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant*,

v.

HOWARD R. HUGHES, ET AL., *Defendants*

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Dated: September 28th, 1971

J. JOSEPH SMITH
J. Joseph Smith

IRVING R. KAUFMAN
Irving R. Kaufman

PAUL R. HAYS, SR.
Paul R. Hays

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

34902 & 35114

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant*,

v.

HOWARD R. HUGHES, ET AL., *Defendants*
HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Defendants-Appellants.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellants Hughes Tool Company and Raymond M. Holliday, and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge Friendly and Judge Mansfield took no part in the consideration of this petition.

HENRY J. FRIENDLY
Henry J. Friendly
Chief Judge

September 28, 1971.

O.

Order of October 7, 1971

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

34902

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of October, one thousand nine hundred and seventy-one.

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant,*

v.

HOWARD R. HUGHES, ET AL., *Defendants.*

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY, *Defendants-Appellants.*

It is herely ordered that the motion by appellants Hughes Tool Company and Raymond M. Holliday to Stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari within the tine provided for such application by Section 2101(c) of the Judicial Code (28 U.S.C. § 2101(c)) and the Rules of the Supreme Court be and hereby is granted, provided, however, that appellants Hughes Tool Company and Raymond M. Holliday on or before October 15, 1971, file, in addition to the security ordered by the District Court, a supersedeas bond in the amount of $85 million or, if agreeable to Trans World Airlines, Inc., other security in an equivalent amount.

J. JOSEPH SMITH
J. Joseph Smith

IRVING R. KAUFMAN
Irving R. Kaufman

PAUL R. HAYS
Paul R. Hays

Circuit Judges

P.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket Nos. 34902, 35114

TRANS WORLD AIRLINES, INC., *Plaintiff-Appellant,*

v.

HOWARD R. HUGHES, ET AL., *Defendants,*

HUGHES TOOL COMPANY AND RAYMOND M. HOLLIDAY,
Defendants-Appellants.

It is ORDERED that the motion of October 13, 1971, by appellants Hughes Tool Company and Raymond M. Holliday, to vacate so much of our order of October 7, 1971, which required said appellants to post "a supersedeas bond in the amount of $85 million, or if agreeable to Trans World Airlines, Inc., other security in an equivalent amount", be and hereby is denied;

IT IS FURTHER ORDERED that the time for said appellants to post the supersedeas bond or other security directed by our order of October 7, 1971, and required to be filed on or before October 15, 1971, be and the same hereby is extended to November 1, 1971.

/s/ J. JOSEPH SMITH

/s/ IRVING R. KAUFMAN

/s/ PAUL R. HAYS

Dated:

October 18, 1971

Q.

Statutory Provisions Involved

UNITED STATES CONSTITUTION AMENDMENT V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

UNITED STATES CODE, Title 15:

§1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; PROVIDED, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: PROVIDED FURTHER, That the pre-

ceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. *Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 14. *Sale, etc., on agreement not to use goods of competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other

commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 18. *Acquisition by one corporation of stock of another.* No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations,

when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: PROVIDED, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

UNITED STATES CODE, Title 49:

§ 1378. (Section 408, Federal Aviation Act) *Consolidation, merger, and acquisition of control.*

(a) *Prohibited acts.* It shall be unlawful unless approved by order of the Board as provided in this section—

• • •

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

• • •

(b) *Application to Board; hearing; approval; disposal without hearing.* Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe:

• • •

§ 1384. (Section 414, Federal Aviation Act) *Legal restraints.* Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all

other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

UNITED STATES CODE, Title 28:

§ 1292. *Interlocutory decisions.*

• • •

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

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RULES OF CIVIL PROCEDURE

Rule 16. *Pre-Trial Procedure: Formulating Issues.* In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Rule 37. Refusal To Make Discovery: Consequences.

* * *

(d) *Failure of Party To Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party. [1]

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[1] Rule 37 was amended March 30, 1970, effective July 1, 1970. The rule now provides, in pertinent part:

(d) *Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard

Rule 54. *Judgment; Costs.*

• • •

(c) *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 55. *Default.*

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made

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to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c). [(A), (B), and (C) of subdivision (b)(2), referred to above, are:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;]

to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.* Judgment by default may be entered as follows:

(1) *By the Clerk.*

• • •

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

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FILED
DEC 28 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-830

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

v.

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,
Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 23, 1971

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Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-Petitioner Trans World Airlines, Inc. ("TWA") respectfully prays that a writ of certiorari issue to review that portion of the decision of the United States Court of Appeals for the Second Circuit, entered in this proceeding on September 1, 1971, which denied certain parts of TWA's appeal to that Court in modifying and affirming a judgment in TWA's favor in the amount of $145,448,141.07, the writ to issue only in the event this Court should grant, in whole or in part, the petition for a writ of certiorari filed by Hughes Tool Company ("Toolco") and Raymond M. Holliday (together "defendants"), which has been assigned No. 71-827 (hereinafter, "defendants' petition").

TWA does not believe the decision of the Court of Appeals against the defendants involves any issue warranting consideration by this Court, which has already had before it upon prior writs of certiorari (Nos. 443 and 501, October 1964 Term) all significant aspects of this controversy except the amount of the damage award. TWA does not believe that the "Questions Presented" listed in defendants' petition are in truth presented on the record, since they assume facts not found to exist. Accordingly, TWA is opposing defendants' petition, and a brief in opposition will be filed. If, however, defendants' petition is granted in whole or in part, so that this litigation of ten and a half years is not now terminated, then TWA asks that its conditional cross-petition also be granted, so that this Court may consider also certain questions which were decided against TWA below.

OPINIONS BELOW

The decision of the Court of Appeals of which review is sought was set out in an opinion by Kaufman, C.J., writing for a unanimous court, reported at 449 F.2d 51 [108a *et seq.**]. It affirmed decisions of the District Court for the Southern District of New York, Metzner, D.J., reported at 308 F. Supp. 679 [50a *et seq.*] and 312 F. Supp. 478 [81a *et seq.*], which in turn confirmed and entered judgment upon a Report and Award by the Special Master, Hon. Herbert Brownell (the "Brownell Report"). The Brownell Report is reproduced with its original pagination in the Appendix to this cross-petition.

Earlier decisions in the litigation include an unreported decision by the Court of Appeals on January 23, 1963, which after briefing and argument denied defendants review by mandamus or interlocutory appeal of a series of discovery orders (including the orders which defendants ultimately refused to obey); and a unanimous decision the following year

* Citations with the suffix "a" are to pages of the appendix to defendants' petition.

per Chief Judge Lumbard, reported at 332 F.2d 602 (1964) [19a *et seq.*]. Two writs of certiorari to the latter Court of Appeals decision were dismissed by this Court at the October 1964 Term, after full briefing and argument, as having been improvidently granted, 380 U. S. 248 and 249 (1965).

Other orders and decisions herein by the District Court for the Southern District of New York are reported at 29 F.R.D. 523 (December 5, 1961); 214 F. Supp. 106 (February 7, 1963) [1a *et seq.*]; 32 F.R.D. 604 (May 3, 1963) [13a *et seq.*]; 38 F.R.D. 499 (November 16, 1965) [47a *et seq.*]; CCH 1966 Trade Cas. ¶ 71,653 (January 4, 1966); and 314 F. Supp. 94 (June 10, 1970) [94a *et seq.*].

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 1, 1971. Defendants' petition for rehearing was denied on September 28, 1971. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether under Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), a plaintiff can recover, as an element of his actual damages, interest computed on the loss sustained for the period preceding the judicial determination of the amount of the loss?

2. Whether, in a suit in which the determination of the amount of damages was referred to a special master whose award was thereafter confirmed in all respects, a plaintiff is entitled to recover interest on the amount thus determined from the date the master's report was filed to the date judgment was entered?

3. Whether under Section 4 of the Clayton Act, a successful plaintiff is entitled to recover, as an item of its actual cost of suit, payments for the services of firms and individuals retained as experts to establish the amount of damages?

4. Whether, in determining the amount of interest to be deducted from plaintiff's damages to reflect the "cost of capital" which plaintiff would have incurred had it been operating free from the unlawful restraints imposed by defendants, the fact that defendants had prevented plaintiff from borrowing money earlier at lower interest rates requires as a matter of law the cost of capital to be computed at such lower rates?

STATUTORY PROVISION INVOLVED

United States Code, Title 15:

"§ 15. *Suits by persons injured; amount of recovery*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

This antitrust case is unique on its facts, and in its procedural history.

It is believed to be one of the oldest private lawsuits still in active litigation in the Federal courts, having been commenced June 30, 1961 in the Southern District of New York.

The plaintiff, TWA, is a major airline, the only United States flag airline authorized to conduct regularly scheduled operations on both transatlantic and transcontinental routes. Its stock has at all relevant times been listed and traded on the New York Stock Exchange.

Defendant Toolco is a corporation wholly owned by Howard R. Hughes, who has directed, controlled and dominated its activities. It has been engaged in the manufacture of oil drilling equipment and has also served as a vehicle for Hughes in a number of other enterprises, including the supply and leasing of aircraft. In 1939 Toolco purchased a minority stock interest in TWA. As a result of that purchase and a number of subsequent acquisitions over the years, Toolco at the time the complaint was filed had a beneficial interest in 78% of TWA's outstanding stock and—until six months previously—had acted as supplier and lessor of equipment to TWA; Hughes and Toolco had dominated all of TWA's activities in connection with the acquisition of aircraft and their financing. At the time this litigation was commenced, Toolco's TWA stock was held in a voting trust established in December 1960, with a majority of the voting trustees being designated by owners of senior debt securities of TWA. In 1966 Toolco sold its TWA stock for net proceeds of more than $546 million, realizing a gain of $452 million over its $94 million cost of acquiring such stock.

Hughes, whom Judge Kaufman termed the "unseen Prince of the drama" (449 F.2d at 61) [122a], was named in the complaint as a defendant, but TWA was never able to serve him as a party; the only valid and effective service ever obtained upon Hughes was as a witness, and it was arranged and vouched for by Toolco.

The third defendant named in the complaint, Holliday, was and is a vice president and director of Toolco, and at the time the complaint was filed was also a director of TWA.*

The complaint charged, in brief, that defendants had violated the antitrust laws by restraining trade in and monopolizing and conspiring to monopolize the supply of

* The complaint was served upon Holliday in January 1962 and his answer was filed in March 1962. In 1963, after Toolco had announced its program of wilful refusal to obey any discovery order of the district court, Holliday expressly elected to be bound for all purposes by Toolco's default, and has presented no separate defense.

aircraft to TWA, thus creating a captive market which they utilized in an attempt to establish themselves in a dominant position as suppliers of aircraft to the American airline industry. They are specifically alleged, *inter alia*, to have, for these purposes, tied the provision of financing for TWA to its purchasing or leasing jets from Toolco, and vice versa; to have enforced an illegal boycott; and to have leased aircraft to TWA on condition that TWA not purchase or lease aircraft from other suppliers. As a direct result of defendants' conduct, TWA was prevented from acquiring an adequate fleet of jet aircraft in a timely manner, and from arranging appropriate financing for such a fleet, to its great damage, originally estimated as being in excess of $35 million (subsequently enlarged to $45 million on notice to defendants, *infra*, p. 7n). Treble damages and an injunction were asked, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1970).

At the damage hearing, TWA eventually presented expert testimony estimating its lost profits, before trebling, as in excess of $105 million on one theory and in excess of $169 million on another theory; the actual damages awarded below amounted to $45,870,487.65. The various items making up the claimed damages and their relationships with the specific restraints alleged in the complaint are reviewed at 449 F.2d at 64-65 [128a-130a]. Judge Kaufman summarized the elements reflected in the final award as follows:

> "The damages which Brownell ultimately awarded to TWA consisted primarily of profits lost as a result of (1) diversion of the six Convairs to Northeast; (2) temporary retention by Toolco of four additional of the ordered Convairs and the ultimate lease of those jets to Northeast; (3) diversion of the six Boeings to Pan Am; (4) the lease, instead of outright sale, of jets in 1959-60; and (5) late delivery of 47 of the 63 jets ordered in 1956, which would have been avoided if, by the allegations of the complaint, Toolco had not unlawfully constricted TWA's financing and acquisition of its own jet fleet." (449 F. 2d 65-66) [131a].

In August 1961 Judge Charles M. Metzner was appointed to preside over the case for all purposes. Initial priority of discovery went to defendants. TWA was required to begin production of documents in August 1961, and Toolco commenced taking the deposition of TWA's new President, Charles C. Tillinghast, Jr., on January 5, 1962.

In February 1962 Toolco served its answer, which included extensive counterclaims both against TWA and against its new management and a number of financial institutions and their officers (referred to collectively throughout the litigation as the "additional defendants"). The counterclaims charged, in effect, that the disasters which had overtaken TWA during the preceding years had resulted not from the unlawful conduct of defendants, but from a supposed conspiracy by the additional defendants and TWA to force Toolco to give up control of TWA and to monopolize aircraft financing in the hands of the additional defendant financial institutions. Toolco's counterclaims alleged that both itself and TWA had suffered as a result (TWA to the extent of at least $45 million), and treble damages were asked.*

Thus TWA's complaint and Toolco's counterclaims were in essential agreement that TWA had suffered serious injuries and that those injuries were the result of violations of the antitrust laws although expressing opposed positions as to the identity of the wrongdoers responsible for those injuries.

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* Toolco's higher evaluation of the damages suffered by TWA was one factor that led TWA's counsel to put defendants on notice (at the outset of the February 8, 1963 hearing at which Toolco announced its intention to default) that TWA had an application for leave to amend its *ad damnum* clause to ask damages of not less than $45 million.

Discovery was coordinated. Documents produced upon the request of any party were made available to all other parties. All were represented at and entitled to participate in the depositions and pre-trial conferences. It was recognized that the entire controversy would be the subject of a single trial, once discovery had been completed. A single final judgment encompassing all issues and binding upon all parties was to be expected, and that judgment would normally have been subjected to a single review by the Court of Appeals and (should certiorari be granted) by this Court.

As matters developed, however, early in 1963, after defendants had spent a year in deposition discovery of TWA (with two depositions completed, two others in progress and a long list still to come), and had, in the words of Judge Kaufman, "* * * explored and exhausted myriad possible avenues for further delaying the day of reckoning" (449 F.2d at 60) [118a-119a], the district court ruled that TWA and the additional defendants should be permitted to commence the depositions originally noticed by them a year previously. The first of these was to be the deposition of Hughes, the principal actor in all the events described in TWA's complaint, and the dominant figure behind Toolco's counterclaims. TWA's notice of this deposition was pursuant to a witness subpoena, while the additional defendants' notice was directed to Toolco, of which Hughes was the managing agent. Toolco conceded that the witness subpoena was valid and enforceable (it had itself arranged to accept service of the subpoena in lieu of answering interrogatories about Hughes's whereabouts). Toolco expressly stipulated that it was responsible for Hughes's compliance with that subpoena. Whatever significance the difference in the two notices might originally have had had evaporated by 1963.

Defendants at this point, first by written notice and then at a hearing in open court, formally refused to participate in any further discovery proceedings whatever, whether through oral depositions or the production of documents,* and stated that they would as a "business decision" default rather than defend upon the merits. This flat refusal to proceed with the litigation on the merits resulted in a final judgment dismissing Toolco's own counterclaims and in an interlocutory judgment in TWA's favor upon its complaint. No final judgment could be entered upon TWA's complaint until after an evidentiary hearing to establish the amount of its damages.

TWA asked that the damage hearing be held immediately, so that appellate review would follow entry of a final judgment on the complaint. However, the district court considered it appropriate to permit the jurisdictional issues raised by the complaint and counterclaims to be reviewed together, stating that an "immediate appeal from this order is justified" (32 F. R. D. at 608) [18a]. The Court of Appeals agreed, granting defendants an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1970).

Both in the Court of Appeals and in this Court the procedurally separate appeals were heard together. Thus there were presented to both Courts at that time, on one or both appeals, the jurisdictional and procedural questions which the district court had passed upon in the

* While emphasis has been placed in the subsequent proceedings upon defendants' having blocked the oral deposition of Hughes, they also at the same time finally and flatly refused to produce a large number of documents, the production of which pursuant to two separate orders they had been contesting during the earlier discovery proceedings. Both TWA and the additional defendants considered these documents to be of great importance to the development of their respective cases on the merits. The maneuverings of defendants during this period are described in greater detail in Judge Lumbard's opinion, 332 F.2d at 612-13 [34a-37a] and in Judge Kaufman's opinion, 449 F.2d at 58-62 [115a-123a].

course of 19 pre-trial hearings, including all aspects of the conduct of pre-trial discovery and excluding only the amount of TWA's damages.

In connection with their default, defendants in 1963 made a number of concessions in open court, including an express acknowledgment of their liability in damages if the several jurisdictional grounds on which they were seeking appellate review were determined against them. As counsel for Toolco stated at the pre-trial hearing before Judge Metzner on February 8, 1963:

> "• • • we are fully aware—my client is fully aware—that by insisting on a right to obtain a review on the legal questions which have been decided to date • • • they may be deprived of further defending on the merits, other than on the question of damages." [2d Cir. App. A-276*]

As he explained at a later point in the same hearing:

> "My purpose of course is to obtain something which will enable me to get a review on the law as to whether or not you are entitled to be here in the first place. And then I am prepared, if I am wrong in that regard, to pay the consequences to the extent to which you are able to prove damages." [2d Cir. App. A-297]

TWA's counsel pointed out that the deposition of Hughes was pursuant to a valid witness subpoena, and that the witness himself had neither objected to it nor made any representation or suggestion to the court that he would be unavailable or would refuse to testify. It was TWA's

* Citations to "2d Cir. App. A- " are to the Joint Appendix filed in the Court of Appeals, a certified copy of which has been furnished to this Court by defendants.

position that, regardless of Toolco's "business decision", TWA was entitled to proceed with this vital discovery to establish the nature and extent of its damages, as well as defendants' responsibility for them. However, at Toolco's express request and in reliance upon its stated willingness to respond in damages, Judge Metzner stayed TWA from proceeding and directed that the deposition (then scheduled to commence in Los Angeles on the next business day) not be held.

The 1963-65 appeals resulted in affirmance by the Court of Appeals of the pertinent lower court decisions on all matters presented for review. As to defendants' procedural arguments, Chief Judge Lumbard stated:

> "Hughes' deposition was absolutely essential to the proper conduct of the litigation. Yet he and Toolco seized upon every opportunity to forestall this event. To this end they demanded the production of a multitude of documents by TWA and the additional defendants and secured successive adjournments of the deposition. Indeed, Hughes and Toolco seemed to look upon the entire discovery proceedings as some sort of a game, rather than as a means of securing the just and expeditious settlement of the important matters in dispute. It was only at the very eve of the Hughes deposition—after the other litigants had been put to much delay and expense—that the defendants made a 'business decision' to terminate discovery." (332 F. 2d at 615) [40a-41a]

Certiorari having been dismissed after full briefing and oral argument in this Court, the Court of Appeals affirmance then became final as to the counterclaims and constituted a binding adjudication against Toolco of the issues presented thereby (including, significantly, the contentions

made in the counterclaims as to where responsibility rested for TWA's losses).*

Following this Court's dismissal of certiorari in March 1965, defendants urged to the lower court, in spite of their prior concessions, that TWA should be required to prove the truth of the allegations of its complaint (default or no default, and without benefit of discovery) before a judgment in damages could be entered against them. Judge Metzner held, however, that defendants, having defaulted, were precluded except within the narrow limits established by *Thomson* v. *Wooster,* 114 U. S. 104 (1885), from contesting the truth of the allegations of the complaint, and that TWA was not required to introduce evidence to establish the truth of those allegations (38 F.R.D. at 501) [48a-49a]. With these principles finally laid down, the damage hearings themselves began in April 1966 before the Special Master, Hon. Herbert Brownell.

The hearings lasted altogether two and a half years, with Mr. Brownell's Report and Award being handed down on September 21, 1968. In addition to witnesses from TWA and the Boeing Company, TWA presented the expert testimony of a firm of consulting engineers, Coverdale & Colpitts, a firm of aviation consultants, R. Dixon Speas Associates, Inc., an investment banking firm, Drexel Harriman Ripley, Inc. and a firm of independent public accountants, Price Waterhouse & Co. Through these witnesses, as Judge Kaufman commented, "TWA * * * introduced evidence linking each component of the damages claimed to the pleaded illegal acts of Toolco and injuries to TWA." (449 F. 2d at 72) [144a] The direct testimony of all of TWA's

* TWA was a party defendant (in substance as well as in form) to the counterclaims. It joined in every motion and brief filed by the additional defendants. It is entitled to all benefits of the decisions rendered thereon, as fully as any other counterclaim defendant.

witnesses was submitted in written form on May 2, 1966, but defendants' study of this evidence and their cross-examination of TWA's witnesses continued through March 2, 1967.

Defendants' own case was presented thereafter entirely through expert witnesses, with several reports being presented by the aircraft consulting firm of Simat, Helliesen & Eichner, Inc. and a report by the investment banking firm of Loeb, Rhoades & Co. The material on which these reports were supposedly based included voluminous computer printouts, which required sophisticated analysis by TWA's experts in order that cross-examination could be carried on effectively. Indeed, after the testimony of defendants' witnesses came to a conclusion on March 27, 1968, TWA's short rebuttal case also included the testimony of a statistical expert on certain matters which had arisen in the course of cross-examination of defendants' witnesses. Recross was completed on April 9, 1968.

Briefing and the preparation by Mr. Brownell of his Report occupied the next six months. A year and a half was then occupied with the district court's review and confirmation of the damage award and the entry of judgment thereon on April 14, 1970, and another year and a half was devoted to the process of briefing and arguing the appeals to the Court of Appeals for the Second Circuit. That Court's unanimous opinion was handed down on September 1, 1971.

Assuming, hypothetically, that TWA is finally permitted on June 30, 1972, the eleventh anniversary of the filing of its suit, to enforce payment by defendants of the damages that the Special Master and the two lower courts have adjudicated in its favor, the eleven years between filing its

complaint and recovering its damages would have been spent as follows:

Period from filing of complaint (6/30/61) to defendants' admission of liability (subject to jurisdictional defenses and asessment of damages) (2/8/63)	1 yr. 7 mos.
Period from defendants' admission of liability (2/8/63) to disposition of appeals on jurisdictional and procedural matters (interlocutory as to complaint and answer, final as to counterclaims and replies) (3/8/65)	2 yrs. 1 mo.
Period from disposition of interlocutory appeals (3/8/65) to the filing of the Brownell Report (liquidating TWA's previously unliquidated damage claim) (9/21/68)	3 yrs. 6 mos.
Period from filing of Brownell Report (9/21/68) to entry of judgment (4/14/70)	1 yr. 7 mos.
Period from entry of judgment (4/14/70) to assumed completion of final appellate review, etc.	2 yrs. 3 mos.
	11 years

REASONS FOR GRANTING THIS WRIT IN EVENT COURT GRANTS DEFENDANTS' PETITION, IN WHOLE OR IN PART

1. The decision below erroneously excluded prejudgment interest from consideration as an element of actual damages under Section 4 of the Clayton Act.

A. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970), provides that a person injured by a violation of the antitrust laws "shall recover threefold the damages by him sustained."

The Second Circuit Court of Appeals, relying principally upon the reasoning of the Seventh Circuit in *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (1970), *cert. denied*, 400 U.S. 1020 (1971), held that TWA was not entitled to recover interest, as an element of the damages actually sustained, from the end of the period when the damages were inflicted upon it to the date of judicial determination of the amount of those damages. The Court of Appeals below stated that it was reasonable to interpret Congressional silence on the matter "as indicating that trebled damages are sufficient penalty and that interest need not be included" (449 F.2d at 80) [159a]. The Court further reasoned that treble damages "will more than adequately compensate TWA for its injuries" and noted the belief that "absent contrary express Congressional intent, [it is sounder] to consider that these difficult and time-consuming inquiries are intended to be avoided" [*ibid.*]. The two cases cited by the Court other than the *Locklin* case—*i.e.*, *Rodgers* v. *United States*, 332 U.S. 371 (1947), and *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945)—dealt with statutes each of which is not only different in purpose but quite different in language from Section 4 of the Clayton Act; neither purports to announce a general principle for interpreting other statutes providing for the recovery of multiple damages. There is nothing in the legislative history of Section 4 to indicate that Congress intended to exclude any element of actual damages customarily recognized by the courts.

At the time the Clayton Act was passed, it was already well established that, in a proper case, interest on a sum found to be due (even though unliquidated) from the time a plaintiff should have had that sum should be regarded as an element of his actual damages, quite separate from the interest which a court allows as a matter of law on judgments. *Lincoln* v. *Claflin*, 74 U.S. (7 Wall.) 132, 139

(1868); *Eddy* v. *Lafayette*, 163 U.S. 456, 467 (1896); *New Dunderberg Mining Co.* v. *Old*, 97 Fed. 150, 153-55 (8th Cir. 1899); *Brent* v. *Thornton*, 106 Fed. 35, 38 (5th Cir. 1901).

The only early reported antitrust cases on this point are entirely consistent with this analysis and are in conflict with the decision of the Court of Appeals below. In *Thomsen* v. *Cayser*, 243 U.S. 66, 74, 88-89 (1917), this Court cited with approval the fact that the jury had added interest to the damages found, thus confirming, in the Court's view, that the verdict was not based on "supposititious profits" but on an actual calculation of damages. Subsequently in *United Mine Workers* v. *Coronado Coal Co.*, 258 Fed. 829, 846-47 (8th Cir. 1919), *rev'd on other grounds*, 259 U.S. 344 (1922), the Eighth Circuit explained *Thomsen* v. *Cayser* as being a particular application of the rule of *Lincoln* v. *Claflin*, *supra*, and held that the prejudgment interest (awarded by the district court in that case as a matter of law) should have been left to the jury as a matter of damages. Both cases involved private antitrust plaintiffs and are predicated on the assumption that Congress intended that such plaintiffs—like other plaintiffs—could recover prejudgment interest as an element of damages.

TWA respectfully submits that the proper interpretation of "damages * * * sustained" in Section 4 is of importance to all private antitrust plaintiffs. This case is not unique in the fact that a substantial period of time has elapsed between the time when plaintiff's damages were actually sustained and the time when a judicial determination of the amount of those damages was made. Since two Circuits now hold that a private antitrust plaintiff cannot recover this actual element of damages sustained, unless certiorari is granted the view embodied in *Thomsen* v. *Cayser* and *UMW* v. *Coronado Coal* will have been, in effect, overruled,

without adequate consideration of the policies embodied in the Clayton Act.

B. It is particularly inappropriate in this case for defendants to escape the payment of compensatory interest for the extended period following their deliberate default. In a non-jury case, the award of such interest is a matter within the discretion of the court, *Miller* v. *Robertson*, 266 U. S. 243, 258 (1924), and the facts here establish a compelling case for the exercise of that discretion.

The adoption by this Court of the Federal Rules of Civil Procedure in 1937 was a historic landmark in the administration of civil justice under common law principles. It gave notice that the natural desire of parties for the courtroom advantage often available, if opponents can be forced to trial unaided by compulsory revelation in advance of potentially damaging evidence, would thereafter be subordinated to the public interest that all parties to a civil action must have a full and fair opportunity to discover and present the evidence relevant to their claims. The discovery rules, which enable parties to develop their evidence to the extent necessary by compulsory process against their opponents, are the basic procedural foundation on which the federal civil system has rested for the past thirty years.

Defendants' deliberate and wilful decision—so announced, with the explanation that it was a matter of business judgment—was to defy this discovery process, to compel, if at all possible, TWA to proceed without benefit of the evidence of intent and motive and of detailed transactions among co-conspirators which would have come out if TWA had been permitted to take the depositions and examine the secret documents to which the district court had found it entitled. Defendants' conduct has been twice reviewed in detail by the Court of Appeals for the Second Circuit, and vigorously condemned. Chief Judge Lumbard, speaking for a unanimous Court, characterized it in 1964 as "wilful and deliberate disregard of reasonable and

necessary court orders and the efficient administration of justice * * *" (332 F. 2d at 614) [40a]. After pointing out that "Hughes' deposition was absolutely essential to the proper conduct of the litigation" (332 F.2d at 615) [40a], he went on to say:

> "Hughes' conduct is particularly intolerable in a large and complex litigation such as this one. The protracted antitrust suit taxes the energies and resourcefulness of each party to the litigation; and it consumes much time of the court and the special masters it appoints. Tactics such as Hughes' serve only to frustrate the implementation of the discovery machinery devised by the federal judiciary to expedite the handling of such complex litigation." (332 F.2d at 615) [41a]

Judge Kaufman in 1971, also speaking for a unanimous court, reviewed the entire proceedings once again and in detail, and summarized its conclusions on this second review in this sentence:

> "The entry of the default judgment was inescapable and virtually invited by Toolco." (449 F.2d at 63) [125a]

Yet the ultimate and inevitable effect of the failure below to allow TWA compensatory interest for the post-1963 period is to reward the very disruptive tactics which the Second Circuit has twice with unanimity found intolerable.

2. The decision below erroneously excluded, in this private antitrust suit, the allowance of interest on the Special Master's award for the period between filing his Report and entry of judgment upon it.

Judge Metzner (312 F.Supp. at 485) [92a] and the Court of Appeals (449 F.2d at 80) [160a] held that TWA was not entitled to interest on the award from September 21, 1968 when the Brownell Report was filed to the entry of judgment thereon on April 14, 1970, although the award was confirmed in all respects.

Some delay is virtually inevitable whenever the question of damages is referred to a special master since—whatever the gain in judicial efficiency—an additional layer of judicial review is involved, and that takes time. The policy underlying Section 4 of the Clayton Act would appear to call for minimizing the adverse impact of such a delay upon a plaintiff whose injuries are the subject of the reference. However necessary the reference to a master may be to determine the damages in a complex antitrust case (and TWA concedes that this case is a classic example of one requiring such a reference), this necessity arises not from anything done by the plaintiff, but from defendants' wrongdoing for which Section 4 is intended to provide a remedy.

This Court has previously expressed its concern that parties not be unnecessarily penalized by references to masters. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957); *Los Angeles Brush Mfg. Corp.* v *James*, 272 U.S. 701, 707 (1927). There surely is no practical reason why such a delay should operate to the monetary prejudice of the plaintiff, when there is available the simple solution of allowing interest on any sum found properly awarded from the date of the special master's award. This is exactly what courts have done for very many years in judgments entered on special masters' awards in other situations. *Illinois Central R.R.* v. *Turrill*, 110 U.S. 301, 303 (1884); *Tilghman* v. *Proctor*, 125 U.S. 136, 160-61 (1888); *L. P. Larson, Jr., Co.* v. *William Wrigley, Jr., Co.*, 20 F.2d 830, 836 (7th Cir. 1927), *rev'd in part on other grounds*, 277 U. S. 97 (1928); *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F.Supp. 383, 417-18 (D. Md. 1963).

The Court of Appeals erred in considering this question to be governed by 28 U.S.C. § 1961 (1970), which provides that in a federal district court interest *must* be awarded on a money judgment from the date of entry thereof at

the rate prescribed by state law.* The omission from that section of the statute of any reference to prejudgment interest had not previously been construed to preclude the award of interest from an earlier date when sound reasons for such an award exist.**

3. The decision below improperly interprets the provision for recovery of "cost of suit" in Section 4 of the Clayton Act to exclude the cost of TWA's experts.

Should a successful plaintiff in a private antitrust suit bear his entire cost of presenting expert testimony on the complex issues relating to the proof of the amount of damages sustained without reimbursement by the defendant? While admittedly a long and uniform line of circuit and district court decisions, stemming from the Second Circuit's decision nearly half a century ago in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791, 806-07 (1924), have answered in the affirmative, this Court has not passed upon the question, which is essentially one of interpreting the phrase "cost of suit" in Section 4 of the Clayton Act.

The legislative history with respect to the adoption of Section 4 is extremely sparse, there being, to our knowl-

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* "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law." (28 U.S.C. § 1961)

** The Seventh Circuit, in *Locklin* v. *Day-Glo Color Corp.*, *supra*, further confused this question with the availability of interest as damages discussed in Point 1 above, and announced the patently erroneous rule that recovery of interest is precluded whenever interest "is not enumerated as a recoverable item in the statute" (429 F.2d at 877). There is no authority whatever for such a rule, which in many situations would result in manifest injustice. *See, e.g., Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F.2d 583, 592-95 (2d Cir. 1961), *cert. denied*, 368 U. S. 989 (1962).

edge, nothing in either the congressional debates or the relevant committee reports that seeks to define the phrase "cost of suit, including a reasonable attorney's fee." The most that can be concluded from the legislative history of Section 4, and from that of Section 7 of the Sherman Act (now repealed) from which Section 4 was derived, is that Congress intended to provide a genuine remedy that would encourage victims of violations of the antitrust laws to seek relief in the courts. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139 (1968); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965); *Radovich* v. *National Football League*, 352 U.S. 445, 454 (1957).

Since the potentially enormous expense involved in bringing suit and prosecuting it to a conclusion is one of the major negative considerations which a prospective antitrust plaintiff must have in mind, it is far more consistent with the basic policy underlying Section 4 that major necessary expenses of suit should be reimbursed than that they should be excluded by interpreting "cost of suit" so narrowly as to include only costs ordinarily taxable by any successful litigant, without benefit of any special statutory provision. Moreover, a broader interpretation finds strong inferential support in the phrasing of the statute. The use of the word "including" is definitional: the "cost of suit" described is one which "includes" attorney's fees. Ordinary taxable costs never *include* such fees, 28 U.S.C. § 1920 (1970), and if such costs were all that was intended, the correct and natural phrase would have been "costs, *and* a reasonable attorney's fee."

TWA's total claim for its cost of this suit, exclusive of attorney's fee, was $2,230,602.83. Again, as it did in the Court of Appeals in order to simplify presentation of the issue, TWA here confines its claim to the fees which it had to pay for the services of firms and individuals retained

as experts in connection with the damage hearing—a total of $1,642,677.71. It is respectfully submitted that the suggested interpretation of Section 4 of the Clayton Act to permit reimbursement of this sum not only is more grammatically and logically justifiable than that of the Second Circuit in the *Straus* case, *supra*, which renders the phrase "cost of suit" mere surplusage, but also more reasonably effectuates the congressional policy behind the statute.

4. The decision below has misapplied a principle approved by this Court in the *Hanover Shoe* litigation by determining TWA's damages on the basis of a "cost of capital" computed in disregard of allegations of the complaint that defendants had precluded borrowings at lower interest rates.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 504 (1968), this Court approved the principle that, in determining the amount of the loss suffered by a plaintiff from a defendant's actions in violation of the antitrust laws, there should be subtracted from the amount by which the plaintiff shows his earnings were decreased an appropriate sum reflecting the probable interest cost, if any, which the plaintiff would have had to incur to acquire income producing equipment not in fact acquired. This deducted amount is described as the "cost of capital". In the *Hanover Shoe* case, in which the damages found stemmed from plaintiff's having been unlawfully required to lease machinery which would have been cheaper for it to buy, an interest charge calculated at 2.5% on the assumed purchase price of such machinery was deducted from the amount of the award.

The same principle was applied in this case by the Special Master, Mr. Brownell, and approved by the courts below. In this case the damages which TWA was awarded were based on loss of earnings resulting from its having

been unlawfully precluded from obtaining a sufficiently large fleet of jets in a sufficiently timely manner. The Brownell Report deducted from the award as "cost of capital" interest computed at the rates of 6.0% and 6.3% on the net assumed investment in the additional and earlier jet aircraft [Brownell Report, pp. 147-67, 173-85]. These interest rates were determined on the basis of interest rates being charged to TWA and others in the 1959-60 period on substantial borrowings for similar purposes. The amount deducted in this computation was very large—a total of $29.0 million was subtracted from the base damage figure, reducing the award, after trebling, by $87.0 million.

TWA does not now dispute the logic and general propriety of a "cost of capital" deduction from a damage award in a proper case. TWA does contend, however, that the courts below should not have charged TWA in this computation at the 6.0-6.3% rate based on interest rates prevailing around 1959-60, when the complaint (*admitted by defendants' default*) expressly alleges that in 1955 and 1956, at a time when funds were available at interest rates of 4% to 4¾%, defendants prevented TWA from making arrangements for financing. To charge TWA in the damage computation with a "cost of capital" based on any interest rate higher than 4¾% is to permit defendants to profit by their own wrongdoing.

The amounts involved, although much less than the $29.0 million actually deducted in the damage computation as "cost of capital", are still substantial. The computation can readily be made from the data presented in the Brownell Report, and would produce a "cost of capital" of $22.5 million—$6.5 million less than produced by Mr. Brownell's calculation. After trebling, the result would be to increase TWA's judgment by $19.5 million.

CONCLUSION

The issues raised by this cross-petition are peripheral to the basic controversy. Although involving very substantial sums, to TWA they are less important than bringing this ten-and-one-half years of litigation to a conclusion. The Brownell Report has been confirmed in its entirety by the district court and unanimously upheld by the Court of Appeals, which has twice reviewed in detail and approved the conduct of the pre-trial proceedings. TWA believes that there is nothing in defendants' petition for certiorari to warrant a further review at this time of what are essentially factual determinations.

Nonetheless, if the Court determines to grant defendants' petition, in whole or in part, TWA believes that the Court should take that opportunity to correct the erroneous results reached below on the questions presented in this conditional cross-petition.

Respectfully submitted,

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